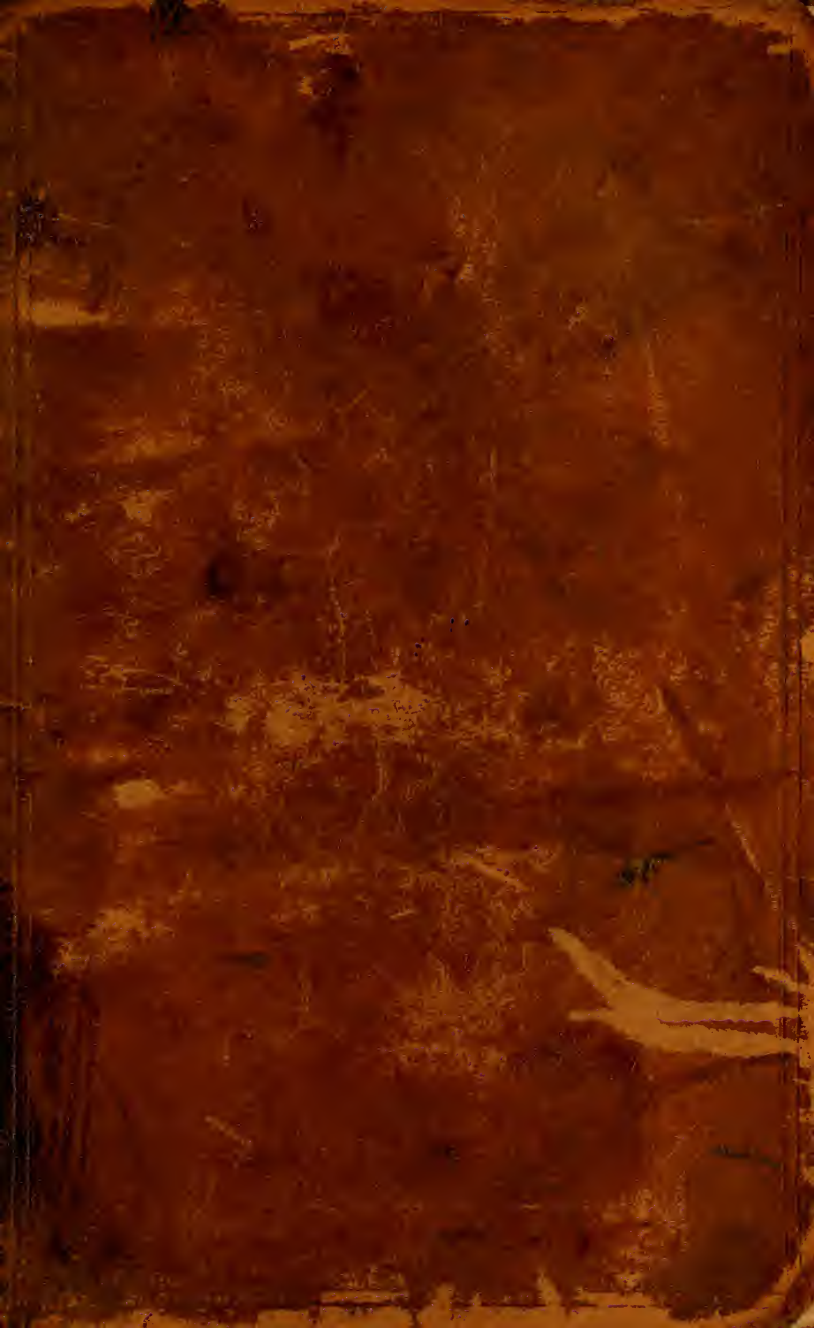

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Decemb. 6. 1676.

I do allow the Printing of this Book.

Fra. North.

Advice to Grand Jurors
IN
Cases of Blood.

Asserting from
LAW and REASON
THAT

In all Cases (where a Person by Law is to be Indicted for killing another Person) the Indictment ought to be for *Murther*, where the Evidence is that the Party intended to be Indicted, had his Hands in Blood, and did kill the other Person.

By ZACHARY BABINGTON Esq;
late Associate in the Oxford *Circuit.*

The Second Edition.

GEN. IX. 6.
Quicunque effuderit humanum sanguinem, fundetur sanguis illius; ad imaginem quippe Dei creatus est homo.
NUM. XXXV. 33.
Nec aliter expiari potest, nisi per ejus sanguinem qui alterius sanguinem effuderit.

LONDON, Printed for *John Amery* at the *Peacock* against St. *Dunstans* Church in *Fleet-street*. 1692.

THE AUTHOR TO THE Reader.

HE that reads the ensuing Tract, will soon find that much of the beginning of it is by way of Introduction to the Subject-matter

of the Book, and might well (if not better) have past under the Title of A Preface, *and therefore might have excused this: in which I shall endeavour to shew the Grounds and Reasons that put me upon this Argument; answering all Objections that may be made against the Author, for being a Sanguinary Person, in treating so positively upon this Subject; shew the necessity of determining the Law herein, in point of practice by* Grand Jurors *in Cases of Blood; give some satisfaction to such as may object against the length of it, whereas the Question is so short; explain the* Grand Jurors *Oath; and lastly, endeavour to remove all Difficulties made by them upon the said Oath.*

Two Reasons principally moved me to this Undertaking; The one was, The great Contests and Differences I have too often observed between the Judges *and* Grand Jurors *about finding of*

of Bills in Cases of Blood, whereby the whole matter of Fact, with all its Circumstances, might receive its full disquisition in Court, and not in a Grand Juries *Chamber; the* Grand Jurors (*as if they were Judges both of the Law and the Fact, which is sufficiently demonstrated in the ensuing Discourse they are of neither*) *finding the Indictment sometimes Manslaughter, when they should find it Murther, contrary to the sense and direction of the Learned Judge, and of the King's Council, whereby a Murtherer many times escapes.*

The second Reason was, That if the Law were not determined in this point, betwixt the Judges *and* Grand Jurors, *the Consequence must needs be, That* Grand Jurors (*that hear but one side*) *would in the end take the matter of Fact from the Second Jury, that are proper Judges of it, and should try it; and the*

ter of Law from the Learned Judge, that should give the Judgment of Law upon it; and this is so plainly proved in the ensuing Discourse, and hath been so often in practice, that I know nothing can be said against it.

Peradventure some may say, Sure he that wrote this Book is *Vir Sanguinis*, that desires such severe Justice against every man that kills another man unlawfully, that he must be Indicted of Murther. *Certainly this is a very great mistake, which a considerate Reader, or one that delights not in spilling of Blood, cannot be guilty of; here is no more desired or intended, but that every Person that hath had his Hands in Innocent Blood, receive a full and a legal Trial, according to the Laws of the Land, and the Liberty of a Subject, to be tried at the King's Suit. And I know no Kingdom or Nation in the World, whose Subjects have a fairer, more impartial,*

partial, and indifferent Trial in such Cases, than the Subjects of England *have; who, except (as I have shewed) they become their own Accusers, must be accused by a* Grand Jury, *and convicted or acquitted by another; and afterwards (if guilty) receive Judgment from a Learned and Merciful Judge, according to the Law of the Land.*

I know by the Law of God, amongst the Jews there was a certain Institution, which we call Lex Talionis, An Eye for an Eye, a Tooth for a Tooth, Life for Life; *and that there were Modifications and Qualifications, to abate the extremity of it, in several Cases to be considered, as I have shewed there, is by the Laws of* England *very parallel to them: This is so far from being Sanguinary, that I conceive it would rather prove a Remedy, than a Mischief, rather prevent shedding of Blood, than occasion it; rather*

ther be Lex Præveniens, *than* Puniens. *And certainly, whoever oppoſeth this Opinion, and propoſeth a milder and lighter way of Trial againſt one that hath had his Hands in the Blood of his Fellow Creature, will hardly himſelf avoid the Imputation of a Sanguinary Perſon. This way propoſed, will prevent that evil practice (too much uſed) of labouring and packing* Grand Jurors, *in point of favour, when they are aſſured before, that all Accuſations, by* Grand Jurors, *for the unlawful killing of a Reaſonable Creature, muſt be Murther. It would conduce very much to the diſpatch of the Buſineſs in Court, and be a great eaſe to* Grand Jurors, *that now ſpend very much unneceſſary time in Queſtions about the Law, in ſuch Caſes, which were better ſpent in examining the Fact, and leaving the matter of Law to the Court.*

Con-

Concerning the neceſſity of this point to be determined, he is a Stranger to the Engliſh Laws, and to the Engliſh Nation, that over-looks the juſt and profitable Conſequence thereof; there being nothing in this enſuing Tract aſſerted, but what is agreeable (as I conceive) to the Statute, and Common Laws of this Kingdom, the beſt allowed Practice, and the Opinions of all the Learned Judges, (at whoſe Feet I have had the happineſs to ſit many years, both before the late Civil Wars, and ſince the happy Reſtauration of our moſt Gracious Soveraign) and agreeable to ſound Reaſon, the fulleſt and beſt Diſquiſition after Innocent Blood.

And who can but allow the neceſſity of it, as to the Engliſh Nation at preſent, when Duels are ſo frequent in England; *it being made matter of Triumph for one* Hector

Duellum, quaſi duorum bellum.

Done without Authority, is a war againſt Authority.

(*as*

(as they call him) to kill another, if it be but for not pledging a Health, or something that looks like an Affront to his Miss, *in placing her at a Ball, in a Playhouse, the Tavern, or the like; and this must not only engage the two differing Parties (although Persons of Quality) to sacrifice their own Lives, and sometimes two Seconds, or more, Persons of as equal quality, to lose their Lives in the Conflict, or by the Law, (if Death ensue to any of them) in which Contest they are no more concerned, than to second their Friend, and with their own lives to justifie the Quarrel between the two differing Parties, as if both of them had a good Cause, and were in the right, when as sometimes the Occasion is so trivial, not fit for two Boys to dispute.*

That which the Victor thinks to be his honour, proves his dishonour. His Life, his Lands, and Goods, are by Law forfeited, and his Blood corrupted.

Infœlix pugna, ubi majus periculum incumbit victori quam victo.

As

As to what may be Objected to the length of this Tract, I have only this to say, That it is no more than I have accused my self for, and did endeavour to have abstracted and omitted much of it; but when I began to do it, I was overcome by these Considerations, That it was the first Essay of this kind that had been written as a Book; That it was not like to meet with all Readers of like Capacities; some perhaps might gather much out of a little, whereas others would gather but a little out of much, and the whole not of many hours reading, which might be worse spent, and therefore was willing to leave it, as I had first framed it, although I exposed my self to be censured for it.

And because Grand Jurors *put so great an Obligation upon the Oath they take as* Grand Jurors, *and from that (as they conceive) frame so strong an Objection*

ction, That they are ſworn to preſent all ſuch things and matters as ſhall be given them in charge; and that the Judges uſually, in their charges, dilate and declare the Law, as to all the ſeveral Species and Degrees of Murther, Manſlaughter, &c. what every unlawful killing of a man is in Law, according to the ſeveral Circumſtances of the Fact: and therefore they, as Grand Jurors, *are bound by their Oath to obſerve the Circumſtances of every Fact before them, what it is in Law as well as in Fact, and ſo preſent to the Court both the Law and the Fact* (Judice inconſulto). *This being the greateſt Objection that I have heard from any of them againſt what is here Aſſerted; although ſomething is ſaid, as to this Objection, in the enſuing Diſcourſe, I ſhall here add ſomething more, to clear the point, and anſwer fully that Objection, by ſetting down the*

Oath

Oath of a Grand Juror, in terminis, *as also the Oath of a* Juror *of Life and Death, and explain them both:* † You shall diligently inquire, and true presentment make of all such things and matters as shall be given you in charge, or shall come to your knowledge, concerning this present Service. The King's Counsel, your Fellows, and your own, you shall well and truly keep secret. You shall present nothing for malice, or evil will you bear to any person; neither shall you leave any thing unpresented for love, favour, affection, reward, or any hopes thereof; but in all things that shall concern this present Service, you shall present the truth, the whole truth, and nothing else but the truth: So help you God.

† *The Oath of a Grand Juror.*

In the first place you see by the Oath, they are sworn to be diligent in their Inquiry, not to be sloathful or negligent, being quickned by their Oath: this diligence

ligence is to be exercised in an Inquiry, and this Inquiry is to be made amongst themselves, in what they know of their own knowledge, or shall be brought unto them by the Testimony of others. As to the matter of their Inquiry, which next follows in the Oath, and from which they frame their main Objection, (viz.) all such things and matters as shall be given them in charge: *these words are general* (things and matters) *and certainly, in the cleerest Understanding, are intended the general Heads of all Offences by them Inquirable; As all Murthers, and that comprehends all manner of unlawful killing: All Felonies, and that comprehends all manner of stealing; and so of other general Heads of Offences here Inquirable, as Perjuries, Forgeries, Misdemeanours, &c. although the Learned Judge (where he hath time and leisure) doth in his Charge, when he speaks of*

speaks of Murther, declare the several Species and Differences in that Offence by Law; and so of Felony, the several manners of Felonies, simple and compound. And so of other Offences, the words of the Oath so much insisted upon by them do no way oblige them by reason of such a Charge, to determine (by their presentment) every nicety in Law, that may arise upon every Fact before them, otherwise than in that form and matter (according to the nature of the Case) the Court and the King's Council have framed and presented it to their Inquiry, where the single Fact of unlawful killing another, &c. by the hands of such a one, is proved unto them so far, as in their Judgments it is fit matter of Accusation, to bring the whole matter of Fact, and all that may depend upon it, to a farther and more full examination (as is more fully manifested in

the enſuing diſcourſe) for ſhould the Judge only give them general heads of Offences in charge (as he well may, and many times doth) without diſtinguiſhing the ſeveral kinds of them, the Grand Jurors *would then want a ground for this Objection; beſides I have ever taken it, that not only that which is orally delivered unto them by the Judge, but that alſo that is delivered unto them from the Judge in writing, to be by them enquired of, is part of their charge, and that is every* Indict-ment *that is preſented unto them, or other matter in Writing commended by the Court to their Enquiry.*

The Juſtices in Eyre, that formerly were Itinerant over the Kingdom (in whoſe rooms theſe Learned Judges ſucceed) ever giving their charge, and whatever was enquirable by the Grand Jurors *in writing; which if ſo underſtood (as I know not how it will be avoided) they are then*

by

by their Oath, to present all such things as shall be given them in charge, and so every Indictment of Murther delivered by the Court unto them, is to be found by them, where (as hath been often said) the unlawful killing is so far proved unto them as to make up an Accusation. Then it follows in the Oath [The Kings Counsel, their Fellows, and their own they shall keep secret;] *By the* Kings Counsel, *is to be understood any directions the Judge shall in Court give unto them in any matter before them; as also the Evidence of Witnesses, that shall be produced to them on the Kings behalf in any fact (for no other Witnesses must be heard by them) and likewise such Counsellors learned in the Law as shall manage the matter on the Kings behalf (for no other Council is to be heard by them against the Bill) none of this must be revealed or discovered by the* Grand Jurors, *but faithfully kept secret accord-*

ing to their Oath from the party concerned, his friends, and all others, except the Court demand any queſtion from them upon their Evidence; ſo likewiſe muſt they keep their Fellow Jurors Counſel, and their own, *that is, they are not to diſcover what any one of themſelves have together counſelled, adviſed, or debated, in the buſineſs before them againſt ſuch a perſon. They are the Kings great Council upon this account, and all ſuch great Councils where the King is ſo much concerned, take an Oath of Secrecy, for otherwiſe by revealing ſuch Counſels, a Traytor, a Murtherer, and the greateſt Felon may eſcape, to the endangering of King and Kingdom; and this offence in ancient time was holden for Treaſon or Felony.* Stamf. fol. 36. 27. lib. Aſſ. *In* George's *Caſe in* Anno 27. lib. Aſſ. *upon his Indictment was acquitted; but the Lo.* Coke *in his* third Inſtitutes fol. 107. *ſays*, Certain it is, that ſuch diſcovery is accompanied with Perjury, and a great

great Misprision to be punished by Fine and Imprisonment. *And it is well provided by the Oath, that each Juror is sworn to keep his own Counsel also; for he that will not keep his own secrets, will hardly keep anothers.*

So much for the matter of the Oath, what they are to do; It follows in the Oath, with what Integrity they ought to do their duty, They are to present no person for any offence, through any malice they have to the person, nor omit any meerly for any favour they have for the person: *This is so plain, it needs nothing but practice; these two seem very easie, but indeed are very difficult to flesh and blood, Not to take revenge when one hath power to do it, and not to shew favour when there is power and opportunity to express it; not but that a Grand Juror may present another he is at difference withal, if there be a real and true cause for it, but it must not*

be done from malice, and by way of revenge, in presenting such a person, before another as guilty. Malice *and* Favour (*two great enemies to Justice*) *are to be excluded all Courts of Justice, as too partial; and therefore the Oath well concludes*, That they shall present the truth, the whole truth, and nothing but the truth: *all these three expressions of* truth *have relation to the fact of Murther, or unlawful killing* (*for I shall in this place apply it to that Offence*) *in a legal sense, as to legal proceedings*; The truth, *that is, Truth sufficient to make an accusation against a nocent person*; The whole truth, *not concealing any part of it wilfully, but so presenting it, that the whole matter of fact concerning the unlawful killing another may come in question to another Jury, which cannot be unless it be found Murther; the Common Law accounting all felonious and unlawful killing a reasonable Creature* Murther

ther, *until the difference and distinction appear upon the Verdict of another Jury, that are to try it, and the Judgment of the Court in point of Law upon that Verdict. Observe the Note in the Margent, what that Statute says;* adjudicetur coram Justiciar. *It shall be adjudged by the Judges or Justices (not the Grand Jury) what is Manslaughter* per Infortunium; *and it can never be adjudged by the Judges, but when it is tried before them, which cannot be upon an Indictment of* per Infortunium *only (as is more fully observed in the following discourse;) Observe likewise what follows in that Statute,* Sed locum habeat Murdrum de interfectis per feloniam. *So that by this* Statute, *all felonious killing is Murther still, as it was at the Common Law before, and that* Statute *is not to be repealed by* Grand Jurors.

Murdrum de cætero non adjudicetur coram Justiciar. ubi infortunium tantummodo adjudicatum est, sed locum habeat Murdrum de interfectis per feloniam tantum, & non aliter. *Statut. de Marlebridge* 52 *H.*3.*c.*26.

And as there must not be in the Grand Jury, Suppressio veri, *a suppression or lessening of the truth; o there must not be* Expressio falsi, *a false Accusation; both are to be avoided, and therefore it follows in the Oath,* And nothing but the truth, *that is, no known falsity, no false Accusation against any person must be presented, whereby to bring an Innocent person to trial, where there is nothing of the fact to be proved against him, or any probable Accusation; if these three* Truths, *in this Oath mentioned, are not to be understood in this legal sense, and according to the common practice of legal proceedings in these cases; I must confess I am to be instructed how any* Grand Juror (*that hears but one side*) *can satisfie his* Conscience, that in a plain literal and Grammatical sense, he can swear that every Presentment and Indictment that comes from the* Grand Jury *with*

* Utramque partem, inaudias, ne judices. Qui judicat aliquid (parte inaudita altera) licet æquum judicaret haud æquus est. *Yet* Grand Jurors *take themselves to be Judges of the Fact.*

with a Billa vera, *contains in it*, the truth, the whole truth, and nothing but the truth; *and this is cleared by the last words of the Oath*, [According to their best skill and knowledge] *for this must be understood, skill and knowledge in the Law and Fact, as to the practice and nature of the proceedings of the Law in such cases, for it is rather* discretio legis *than* hominis.

this is not in the form of the Oath before mentioned.

And thus have I, according to my best sense and understanding of the Oath, explained it, and answered the common Objection to it, by making it appear, that there is nothing in the Oath that any way obligeth them against what I have either here, or in the ensuing discourse, advised them unto. And that this may yet be more evident (because I would make it as plain as I can, though with too many Tautologies and Repetitions) I shall also in terminis *set down the Oath of the* Jurors *of Life and Death,*

by

by which it doth appear, that they only stand charged with the Prisoner (as it is expresst in the Oath) and the Grand Jury *only with the Accusation against him*; [You shall well and truly try, and true deliverance make between our Sovereign Lord the King and the Prisoner at the Bar (whom you shall have in Charge) and a true Verdict give according to your Evidence; So help you God.] *Which is to be formally and legally drawn up in the nature of a Declaration at Law at the Kings suit, the King being Plaintiff and the Prisoner Defendant, which the Prisoner upon his Arraignment either confesseth, and then he is convicted without hearing of any Evidence against him, or otherwise pleads* Not guilty *to it, to which the King (by the Clerk of the Crown) joyns Issue by* Cul prit, *viz.* that he is ready to prove him guilty; *and so the Issue being thus joyned, Evidence for the King is given against*

againſt him upon Oath, to which he makes his defence in perſon, or by * *Council (if any point of Law ariſe to which he deſires Council, and the Court approve of it, the Judge being as well of Council for the Priſoner as the King) calls his Witneſſes (if he have any) who ſpeak upon their Credits, and not upon their Oaths, which is much for the advantage of the Priſoner, the Law preſuming (in favour of life) the Affirmative proof to be ſo clear againſt the Priſoner, that nothing in the* † *Negative can be proved (upon Oath) againſt it; and after a full trial of what can be ſaid and proved on both ſides, and a convenient time taken by the Jury to conſider of it, they bring in their Verdict, either convict him or acquit him; either find him guilty according to the Indictment found*

* If he have Council, he muſt pray it before he plead *Not guilty*, he cannot after. 3. *Inſt. fol.* 129.

† And that is one reaſon why regularly he cannot have Council. The ſecond reaſon is, the Court ought to ſee the Indictment, Trial, and other proceedings good in Law, left by an erroneous Judgment they attaint the Priſoner. 3. *Inſt.* 137. *fol.* 29.

found by the Grand Jury *by hearing of one side, or specially as they find the fact by hearing of both sides; for they are not bound strictly to the matter and form of the Indictment, as the* Grand Jury *have found it, for they may by Law extenuate it to the least degree of offence, that can be in that kind, but they cannot aggravate it, or exceed above what the* Grand Jury *have found; for if they might do so, they would become Accusers as well as Tryers, which would be against the Laws and liberty of the Subject: And therefore the* Grand Jurors *have the greater reason, to enlarge in their Declaration or Accusation for the King (as in all Declarations at Law is usual) as far as the Law will heighten all offences in Blood, since the other Jury have so much liberty to lessen the damages, and extenuate the Crime, whatever the Accusation is.*

Secta pacis *is by Indictment, which is the King's Suit, and as it were his Declaration. The King formerly did not pardon* homicidium, *but* Sectam pacis nostræ quæ ad nos pertinet de homicidiis. 3. *Inst. fol.* 235.

Now

Now upon what I have written in this Preface, and the Book, I am not ignorant how much I have subjected my self ad captum Lectoris, *to the various censures of the several Readers, especially such as use to serve, or may serve on Grand Juries, Gentlemen I know of the best quality next to the Peers of the Realm, and in which Employment for their King and Country it is an honour to serve; And I hope it will be no dishonour nor indignity to any of them to entertain, or at least to peruse this Advice, how they may with the greatest prudence and fidelity pass through an Enquiry after Innocent Bloodshed, when they are called unto it, and leave nothing therein (of this Crying Sin) to be repented of, that it was not fully Enquired of by them, that so their exact care and Justice may keep themselves secure from the guilt of Innocent blood.*

I doubt not but it will meet with some Readers so possessed with the contrary Opinion, by an erroneous practice or misunderstanding of the Laws, and of the Grand Jurors *Oath, that so soon as they read the Title will cast away the Book and cry, a Paradox; Others happily more unbiassed in their Opinions, and of more moderation and ingenuity (if they dislike) will publickly confute it, with stronger arguments and grounds of Law and Reason, and better experience in point of practice, and so determine the point; and in that I shall have my end.*

I am very certain, that I entred not upon this Subject with an offensive mind, but cum moderamine inculpatæ tutelæ, *not with a direct design to kill any, but rather to fright, weaken, and drive away that* Dæmon *of Passion in man to commit Murther, and to give the best advice to* Grand Jurors *in Cases of Blood.*

A small thing, oft times, hath the power to redreſs a great Inconvenience, yea, to take up a cruel Feud; as Virgil *ſaith, of that of* Bees *when they are actually engaged in battel,*

Hi motus animorum atque hæc certamina tanta,

Pulveris exigui jactu compreſſa quieſcent.

ADVICE

ADVICE TO Grand JURORS IN *Cases of Blood.*

IT is the great happiness, freedom, and liberty of the *English* Nation, that (in all common and ordinary Trials) of offences Criminal and Capital, as Treasons, Murthers, Felonies and Misdemeanors, each Freeman (and so are all the people

of *England*, as to this) shall receive his Trial *per pares*, by his equals; which is well provided for by the great Charter of the Liberties of *England*, in these words; *No Freeman shall be taken, or Imprisoned, or disseised of his Freehold, Liberties, or Free-customes, nor be Outlawed, banished, or in any manner destroyed, &c. but by lawful Judgment of his Peers, or by the Law of the Land.* This Chapter of *Magna Charta* is partly repeated in a later Statute, (*a*) and there *Law of the Land* is expounded [*Indictment*] process by Writ original, and course of the Law: Another Statute recites it, and instead of the words *Law of the Land*, puts in Process of the Law, as *equivalent* and *Synonimous*, signifying the same thing. And again, a Statute of that King says, (*b*) *No man shall answer without Presentment before the Justices, or matter of Record, or by due Process and Writ original*, according to the old Law of the Land, (*c*) as it is well observed

(a) 25 E. 3. 4. 5 E. 3. 9. 42 E. 3. 3. *Vit. Abbot St.* Alban. 143.

(b) 37 E. 3. 18.

(c) Cook 3. *Inst. Tit.* Indict. 136.

ſerved by the Lo. *Cook* (that Oracle of the Law) *In pleas of the Crown, and other Common offences and Nuſances, the King cannot (in an ordinary way) put any man to anſwer; but he muſt be appriſed by Indictment, or other matter of Record.* For, by the Law of the Land, a Felon or a Murtherer cannot be convicted (*d*) or attainted (though he confeſs the Felony or Murther) until a grand Jury have preſented the offence; nor can any perſon (generally and ordinarily be convicted or attainted, or have Judgment of life, or Member) upon any Criminal accuſation; but there muſt be two Juries paſs upon him, at leaſt 24 perſons, the one a Grand Jury (*ex parte Regis*) to preſent the offence fit for a trial; the other a petit or leſſer Jury, *inter Regem, & perſonam accuſat.* to try the truth of that Preſentment (*e*). The Grand Jury coming from all parts of the Coun-

(d) *Except by utlawry.*

(e) *No Peer, or Subject, can be Convicted by Verdict; but the Offence muſt be found by twenty four.*

ty (*f*), the other Jury of the very neighbourhood *de vicinetto*, where the offence was committed; for, *vicini vicinorum facta optime præsumuntur scire*; and so in probability of Law, are presumed to know something experimentally (besides what they have by Testimony) both of the quality of the person, truth, and nature of the offence, with all its circumstances, and happily the credit of the Accuser and his Witnesses. It is not sufficient that they dwell in the County, but they are to be of the Neighbourhood, nay, *le plus procheins* to the place of the fact, as by *Artic. super cap.* 9. it is appointed; They must be most near, most sufficient, and least suspicious, *ibid.* The first being called a *Grand Jury*, or a Great Jury, either in respect of their number, being above twelve, (the general certainty of all other Juries) and may be as many as the

(f) *It is not sufficient, that they dwell in the County, but they are to be of the Neighbourhood; nay,* le plus procheines *to the place of the fact*; *as by* Artic. super *cap.* 9. *it is appointed, They must be most near, most sufficient, and least suspicious.* ibid.

the Court pleaſe, but uſually exceed not 23, and in good prudence (when there is much, or weighty buſineſs) there ought not to be a leſſer number, for if there be leſs or more, they may be ſo divided, that there can be no verdict (as by experience hath been obſerved) for leſs than twelve agreeing, cannot make a Legal verdict: Or they are called *Grand* in reſpect of the quality of their Perſons, and greatneſs of their Eſtates, ability of their Judgments (being of good Education) or laſtly (which I conceive the beſt reaſon) that, *propter excellentiam*, they are ſtyled (g) *Juratores pro Domino Rege pro Corpore Com.* Jurors for our Soveraign Lord the King for the County of *S.* and as the Commons in Parliament are to the whole Kingdom, they have an unlimited power to preſent all offences committed in their County, that are *contra Pacem*, *Coronam*, & *dignitatem Regis*, againſt the Peace, the Crown, and dignity

(g) *The King's Jury.*

of the King, againſt either Statute or Common Law, they being the great and grand Spring, or *Primum mobile* of the Court, that gives motion to all the other wheels; their Preſentment being the key, that either opens or ſhuts the proceedings of the Court in every offence. And therefore it is that the Law of *England* takes care, that as well the Grand Jury, as the other Jury, conſiſt of perſons that are *probi*, & *legales homines*, good and lawful men; each man muſt be *probus*, *quaſi probatus*, an approved honeſt man; *vel a Græc.* Προσάγειν, & *qui progredi poſſit prægredi debet*, he that will go on in vertue, certainly ought principally to be choſen to attend the Courts of Juſtice. It is called, *Juſtitia, quaſi juris ſtatio, vel ſtatus, quod per Juſtitiam, jus ſtat*, i. *exercetur*. (*h*) It is called *Juſtice* becauſe it is the Standard of Right, *miſera ſervitus ubi Jus vagum*. *Juſtice* being one of the Cardinal vertues ought to be attended

(*h*) *Jus à Jovis nomine. Jus qu.* Jovis *os; omne enim Jus & Juſtitia à Deo eſt.*

attended by none but the *virtuoso*, the most vertuous, pious, and ingenuous persons; *probi* signifying, not only *faithful*, but *skilful*; none can be presumed to be faithful in keeping an Oath, (*i*) that wants skill to know how to perform his duty; What expectation can there be of a good Verdict, from a bad or ignorant man? Can he that is not capable to understand a Cause, ever make a right Judgment of it? Will a Liar present a truth; a Thief convict his fellow thief; a Man of blood a Murtherer? or, Who can expect Justice from him who neither to his God nor to himself is just, or true? He that believes Judges are *quasi Dei*, *Gods* (as the Scripture calls them) or that God sits amongst, and is present with Judges in Judgment (as in the Scripture sense it is truth, and ought to be believed) cannot

(*i*) v. Statut. 3 Ed. 1. c. 11. *Forasmuch as many being indicted of Murther, and Culpable of the same, by favourable Inquests taken by the Sheriff, and by the Kings writ of* Odio & Atia *be replevied unto the coming of the Justices in Eyre. It is provided such Inquests shall be taken by lawful men chosen out by Oath (of whom two at the least shall be Knights) which, by no affinity with the prisoner, or otherwise, are to be suspected.*

5 H. 7. fol. 5. Coke l. 9. f. 56. 9 H. 3. c. 25. 6 Ed. 1. c. 9. Regist. fol. 133.

but apprehend how unreasonable it is, to bring such a Jury before such a presence, to act in a concernment of so high a nature, as the life of a Man; *whose* verdict ought to be *veredictum*, a true saying, *quoddam Evangelium*, as the Gospel they swear upon, *dictum veritatis*, the saying of Truth it self (especially as it is the verdict of the Jury of life and death) who have the advantage of hearing, not only the Accuser and his Witnesses, but also the party accused, and his Witnesses face to face. They are called, although a (*k*) Petty Jury, yet a Jury of life and death, which the Grand Jury are not; although they enquire of the same offence, from the great power in their hands to acquit or condemn the life of a man, according to their evidence. Upon whose verdict, the Judge according to Law grounds the Judgment of life or death, of acquittal or condemnation; and as a Jury may give a just verdict (as to themselves) upon

Juramentum quod mente Jurator.

(k) *In respect of the Grand Jury.*

upon a false Testimony given to them, so may the Judge (as to himself) give a just Judgment upon a false verdict given by the Jury. For as the Jurors are excusable, that give their verdict, *secundum allegata, & probata, per sacrum Testimonium*, by what is alledged and proved to them by the Oaths of Witnesses, or confession of the party; even so that Judge is excusable (*in foro Conscientiæ*) that gives Judgment upon a verdict (though false) for he doth not therein *Jus dare*, but *Jus dicere secundum veredict. Jur.* upon the verdict of the Petit Jury and presentment of a Grand Jury, and this is fully verified in two remarkable (*l*) Cases noted in the Margent; a sufficient caution to all Judges, not to try any for Murther, where they have not an infallible evidence of the death of the party slain.

(*l*) Coke *Instit.* 3. *fol.* 232. Glouc. *Assizes xiij.* Car. 2. *Regis* (Harrison's *case*) *Nimia præcipitatio & morosa cunctatio*; two dangerous extreams.

And as every Juror ought to be *probus homo*, an honest and a skilful

ful man, so ought every one to be *legalis homo*, a person so qualified that the Law allows of; for a man may be an honest, prudent, and just man, and yet in the eye of the Law not a lawful Jury-man; for in one sense he is not *legalis homo*, that is not *ligeus & subditus Dom. Regis Angliæ*, for the Law provides that the Kings Liege people shall be tried *per pares*, by their equals, their fellow Subjects: In a proper sense he is said, in Law, not to be *legalis homo*, that is *homo utlagatus*, an outlawed person, one that is *extra legem positus*; who is no better than one that is *extraneus*, an alien, a stranger, one not only put out of the protection of the Law, but such a one as the Law will have nothing to do with (as he so stands) in Courts of Justice, to serve as a Juror; nay, such a person being a Juror, will make the verdict void, and it is a good exception in arrest of Judgment, that any of the Jurors were outlawed. But in a larger sense he is not

vi. Coke 3. *Inst. fo.* 32. *tit.* Petit Treason.

not *legalis homo*, such a legal and indifferent person (as the Law requires) who is either in such a degree of blood to the prisoner, as the Law presumes him partial, or in such an evil reputation, as the Law presumes him unjust; for as it is not fit for a Father to be of a Jury to try his Son, or the Son the Father; Brothers, Uncles, or near Relations to try one another, so it is not fit that he that is *particeps criminis*, or indeed *criminalis homo*, a man that stands judicially accused, indicted, convicted, or attainted for Felony, to try another for Felony (or indeed to be a grand Juror to present it) the Law provides that each Juror ought to be a person, *rectus in Curia*, that stands right in Court, above and against all natural, rational, and legal exceptions. *Qui accusat integræ famæ sit & non criminosus*; for certainly, to clear the matter of fact (as a Juror of life and death) and wisely to discern the Cause in question, upon

He is liber & legalis homo, *that is a man of fame and credit, that doth enjoy* liberam legem. Coke 3. *Inst. fol.* 22. 11 H. 4. Coke 3. *Inst. fol.* 32.

upon a doubtful and perplext Evidence, many times, requires as great ability in the Jurors of life and death, as in the Judge to examine the cause, and to give Judgment upon the Verdict; there being much more of Black-art used to darken and obscure the truth of the fact (in cases of Bloud) amongst the Jurors (especially if either a great Person, or rich, be concerned therein) than possibly can be, to prevent or prevaricate a right Judgment, in the Judge; or by any dust of gold, power or favour, to put out his eyes, or falsifie his clear sight, who sits every way above such a temptation.

The Jurors of *England* (especially in the Circuits) with their unequal yoke-fellows the *Talesmen*, are (for the most part) the very scandal of the Laws practical of *England*, who seldom serve, but to serve a turn (*m*), to obey a Superiour, pleasure a Friend, or to help

(*m*) *'Tis hard to get an unbiassed Jury. Some serving, that had more need to be relieved by the* 8 d. *than discretion to sift out the truth of the fact.*

help away (in a hurry) a quick dispatch of practice: This fault is not in the Laws of *England*, but the male execution of them. The Statute of the 27 *Eliz. c.* 6. provides that each Juror should have at least four pounds *per annum* in Lands, Tenements, or Rents; and this must be their sufficiency, where the (*n*) debt or damages (or both together) amount to forty marks. The general course of the world being to esteem men according to their Estates, *Quantum quisque sua nummorum servat in arca, tantum habet & fidei.* Jurors that have Estates to lose, will be afraid to commit perjury. The best things abused, alwaies prove the worst; the sweetest Wine makes the sharpest Vinegar, not that the fault is in the Wine, but in the use and abuse of it: were better care taken in return of Jurors (*o*), I dare say, the trial by *twelve*

(*n*) Coke 1. *Inst.* 272.

(*o*) *In ancient time the Jury, as well in Common Pleas as in Pleas of the Crown, were twelve Knights.* Glanvile *lib.* 2. *c.* 14. & Bract. *fol.* 116.

would

would not be more ancient than excellent; the Excellency of it appears, in the long, constant, and general use of it amongst the people of *England*. This way of trial, to have all their Estates, Injuries, and Lives tried by twelve men, and those Neighbours, of our own degree and parity, and without exception (upon a lawful challenge) certainly nothing can be said more for the commendation of it, than the constant practice, and unanimous approbation of it in *England*, to this day, since the first beginning of it: The trial by *twelve* being very ancient, though Mr. *Daniel*, and *Polydor Virgil* deny it to be ancienter than the *Norman* Conquest. *But Polydor* (as says the excellent Sr. *H. Savil*) *was an* Italian, *and a stranger in our Common-wealth, and so deceived!* (*p*) It is of *English Saxon* descent, as by the Laws of King *Etheldred*, *cap.* 4. thus; *In all Hundreds let Assemblies be, and twelve Free-men of the*

(*p*) Lamb. *in verbo Centur.* D. Spelman *in Jurat. vide Consult. de Martic.* Walliæ *v.*3.

the most ancient together shall swear, not to condemn the Innocent, nor absolve the guilty. It was in use with the *French*, in the Age of *Charlemaine*. They that would see more of this, let them read that learned and ancient Book written by Judge *Forteſcue*, in commendation of the Laws of *England*. I shall leave this Subject, having briefly touched upon the happiness and liberty the Subjects of *England* enjoy, to have their trials for their Estates and Lives, *per pares*, by Juries of twelve men; what manner of persons Grand Jurors and those Jurors ought to be, and of the excellency and antiquity of such trials; in the next place (after I have shewed the heynousness of Murther, both by the Laws of God, and the Laws of this Land, and made some little parallel therein) I shall briefly shew, That it is the duty of all Grand Jurors, in all Cases of blood, touching the death of any reasonable creature, by violence,

violence, or by the hand or act of any other reasonable Creature, where the Bill of Indictment is brought unto them for Murther, in case they find, upon the Evidence, any probability that the person said to be killed in the Indictment, was slain by the person charged to do it in the Indictment) to put *Billa vera* to that Indictment, without foreclosing the Court, by judging amongst themselves the points of Law that may arise in that case, as whether it be Murther, Manslaughter, at Common Law, or upon the Statute *Se def. per Infortunium*, Justifiable, or otherwise; none of these special matters being to be found by them that are but Inquisitors and Accusers for the King; not tryers of the offence, hearing but Witnesses on one side, and whose presentment, or verdict, is not final, but must be put to Issue betwixt the King and the party to be tried by another Jury, whether there be truth in it or no, whatever the practice

practice of Grand Jurors hath been (of late) to the contrary; this being the chief aim and design of this Tract.

I have not met with any amongst Christians, and I believe there is none amongst Heathens, or rational Creatures, but believe, whatever their practices are to the contrary, that the shedding of Innocent bloud is a great offence, a crying sin. To take away the life of a Plant, is but the vigour in the juyce; and the life of a Beast, is but the vigour in the bloud; but the life of a Man is a (r) *spirit*, and spiritual substance, the breath of God breathed into him, and not to be extinguished unjustly by the hand of man. Certainly, *vox sanguinis est vox clamantis*, it is one of the four sins (s) that the Scripture calls, *Clamantia Peccata*, Crying Sins, that cry to God for vengeance (even in this world) upon the Manslayer. Immediately after the Floud God

(r) Gen. 9. 4.

(s) *Sunt vox clamorum, vox sanguinis &* Sodomorum, *vox oppressorum, merces detenta laborum.*

commanded, that blood unjuſtly ſhed ſhould be required by the Magiſtrate of the Manquiller. It is within the *Magna Charta* of God himſelf, and by an Act of Parliament made in Heaven, never to be repealed, It is enacted, that *he that ſheds mans blood, by man ſhall his blood be ſhed. At the hand of every mans Brother will I require the life of man*, ſays God himſelf (*t*). God many times allowed of *Reſtitution*, and other ſatisfactions in other Felonies, but never in caſe of blood; for, *who can make ſatisfaction for the life of a Man*?

(t) *Solus Deus qui vitam dat vitæ eſt Dominus; nec poteſt quiſquam eam juſte auferre niſi Deus, vel gerens authoritatem Dei, ut Judex.*

And this was the reaſon, that amongſt Chriſtians it was not lawful for the Lord to kill his Villain.

The firſt Murtherer that we read of was the Devil, who the Scripture ſays, *was a Murtherer from the beginning; in quantum traxit in peccatum*, in drawing our Firſt Parents into ſin, and ſo to death. The next that we read of (for

(for the Devil would not be long before he had tempted more to his own sin) was *Cain*, that kill'd his Brother *Abel*, and it seems very desperately shed much of his blood in many parts of his body, for the word is in the Plural number, *vox Sanguinum*, the voice of his *Bloods*; or, because the Bloods of the future posterity of *Abel* (that he might have had) were shed in him, by the Murther of *Cain*. It is true that *Cain*'s blood was not shed by that Law, although he kill'd his Brother, the World being not then peopled, nor that Law then so positively given by God, and the example and terrour to others could not then be so great (which is oft the great end of punishment, *ut pœna ad paucos metus ad omnes perveniat*;) and therefore *Cain* was to survive by God's special appointment, not by any favour of God towards him, but that he might have Gods mark (as a Murtherer) upon him, to the Terrour of all

others that should see him. What visible mark and distinction this was, is but conjectured at; some think it was a horrible shaking over his whole body, as the *Septuagint* translate, who, for *Thou shalt be a Vagabond and Runagate*, read, *He should (u) sigh and tremble*; or an exceeding shame and confusion, in that he ran from place to place to hide himself; or some visible mark in his face, as *Lyranus* thinketh: Some *Hebrews* think it was a horn in his forehead; some, a letter; some, that a Dog led him. The Scripture is plain, that for this Murther he was to be a *Fugitive, and a Vagabond upon the face of the Earth*; one (as the Text says) that *went from the presence of the Lord*, to whom the Earth was accursed; and certainly the guilt and shame he carried about him, like the bloody *Jews* that murthered Christ, and are to this day Vagabonds over the Earth; or those bloody surviving Regicides, that mur-

(u) *Occultum flagellum.* The wound of Conscience.

murthered the best of Kings (*x*) (yet live, with that black mark of King-killing upon them) was, and is, a Judgment greater than death it self; as it is in the *Psalms* (*y*), *Slay them not lest my people forget it: but scatter them abroad amongst the people, and put them down, O Lord, our defence.* And that was the Judgment of *Cain*, who before his natural death (some say) was kill'd by *Lamech*, who shot in a Bush at a Beast, and kill'd *Cain* (*z*). And the *Turks* at this day believe, that at the Day of Judgment, when the Grave and Hell shall deliver up their dead, *Cain*, that Fratricide and murtherer, shall lead, and be as it were the Captain of the damned in Hell.

(*x*) K. Charles *the First.*

(*y*) Psal. 59. 11.

(*z*) Theod. *quæst.* 44. *in* Gen.

Amongst all the Laws of God, which he himself appointed the *Israelites* (his own People) when they were to inhabite *Canaan*, the Land of Promise, there was not any mercy, or City of Refuge appointed for a Murtherer or Man-

slayer, but only where it was done unawares; as several clear Cases are put in Scripture to make this
35.Numb.23. plain, 35 *Numb.*23.v. *If one throw a Stone that a man die thereof (and saw him not) but did it unawares.* So the 19. *Deut.*5. *When*
19.Deut.5. *a man goeth to the wood with his Neighbour* (mark how strongly this Case is put, with his Neighbour, his Friend, whom he had no unkindness for) *to hew wood, and as his hand fetcheth a stroak with the Axe to cut down the Tree, the head slippeth of from the helve and smiteth his Neighbour that he die;* in these, and many such like cases there put, *he shall flee to the City of Refuge, and stay there until the Congregation shall judge betwixt the Manslayer, and the Avenger of blood, whether he did it wittingly, or unawares.* The *Hebrews* understand by the *Congregation*, the *Senators* and *Chief Judges* of the City; and although it were done *unawares*, and so adjudged by the Congregation, yet

yet so hainous was the offence of Blood before God (though nothing of mans will in it) that even such Manslayer was never (during his life) afterwards to depart from the City until it was so adjudged by the Congregation, or until the death of the High-Priest, (who was a type of Christ that set us all free;) for if he did depart, then the Avenger of blood, (who was next Kinsman to the party slain) might, if he met him, justifie the killing of him. So it is very apparent, that before these Cities of Refuge were appointed for mercy to him that had killed another unawares, such a Manslayer might have been killed by the Avenger of blood, as well as he that had killed another wilfully: and after they were ordained, they could not be intended to shew Mercy, or to be an *Asylum* or Sanctuary for any that had willingly, wilfully, or by a passionate assault killed another. If it be objected (as what sin or

offender is there that hath not his Advocate) that it is said in the 19. of *Deut.* 11. v. *But if any man hate his Neighbour, and lay await for him, and rise against him and smite him that he die, and then flie to any of those Cities, he shall be fetcht thence, and delivered into the hands of the Avenger of blood, that he may die. Thine eye* (though the tendereſt part thou haſt) *shall not spare him* (how comely ſoever his perſon may ſeem) *but thou shalt put Innocent blood from* Iſrael, *that it may go well with thee* (*a*). If it ſhall be inferr'd from hence, That the Cities of Refuge were ordained for all ſorts of Manſlaughter, but where it was done of malice, forethought, ancient hatred, or with a ſedate and malicious mind; hereby implying, that he that kills another upon a ſudden quarrel, aſſault, or in heat of blood (as it is termed) might flie to a City of Refuge, and find Sanctuary; It muſt needs be upon a very great miſtake.

19. Deut. 11.

(*a*) i.e. *with the Magiſtrate and People.*

mistake. Nor can the Judicials of God herein (put into several plain and illustrating Cases by God himself) be reconciled if it should be so understood: It is said in the 31. *Exod.* 13. *If a man lay not wait, but God deliver him into his hands, then I will appoint thee a place whither he shall flie.* The meaning of the *delivering him into his hands*, must of necessity be understood of such a providence that could not be foreseen, and so not possible to be prevented by the Manslayer, wherein there could be nothing of his will, but purely chance and unawares, as in the Cases put before of casting the Stone, and killing one he saw not; cutting of the wood, and falling of the helm of the Axe, or Bough from the Tree; where many such Examples might be given, which the Law of *England* now sums up in one head or Reason, *viz.* (*b*) Where one is doing

(*b*) *utrum quis dederit operam rei licitæ an illicitæ.* Stamf. lib. 1. fol. 12.

doing a lawful and justifiable act in his Trade, Calling, or lawful Recreation, and by chance and unawares, another happens to be kill'd by him, then he shall have a Pardon of course now instead of a City of Refuge (as shall be hereafter shewed) for it is very plain by expres places of Scripture, that all other voluntary killing of a man unlawfully, found no Mercy, no City of Refuge, but there the Manslayer was to die by the hand of the Avenger of blood (it appearing so before the Magistrate or Congregation:) As to instance in some few Cases out of Scripture. 21. *Exod.* 12. *He that smiteth a man that he die, shall be slain for it:* if any destruction follow, there he shall give life for life (except it be unawares.) So in the 16, 17, 18. v. of the 31. of *Numbers*, *If any man smite another with an instrument of Iron that he die, then he is a murtherer, and the Murtherer shall die for it. If he smite him by throwing a Stone that*

21. Exod. 12.

31. Numb. 16, 17, 18.

that he die, he that smote him is a Murtherer, let the same murtherer be slain; therefore the Avenger of blood himself shall slay the Murtherer. When he meeteth him he shall slay him (mark the Ingemination,) *he shall surely slay him*, as it is in the 21. *Exod.* 12. *He that smiteth a man that he die, shall die the death*; that is, *shall surely die*; for this doubling of the word, *importat majorem certitudinem*, importeth greater certainty; and yet in all these Cases, not one word of *malice*, *lying in wait*, or *enmity*. (c) It is a general Law, He that killeth should be killed again, and this Law is grounded upon the Law of Nature; for like as it is agreeable to Nature, *ut putridum membrum abscindatur, ut reliqua conserventur*, that a rotten member should be cut off that the rest may be preserved; so a Murtherer is to be killed, *ne plures occidantur*, lest more should be killed. This Law

All these sudden Actions.

(c) *He that smiteth another that he die*; sive intendat occidere, sive non, *shall die.*

Gen. 9. Law is given unto *Noah*, *Gen.* 9. when the World was restored; and here it is but repeated and renewed. The Laws of other Nations herein consent with *Moses*: The *Athenians* did severely punish Murther, expelling the Murtherer from the Temple of the Gods, and from all Society and Colloquy of Men, till he had his Judgment. And by the Law *Cornelia*, among the *Romans*, He which had killed another with sword, or poyson, or by false Testimony, lost his head, if he were of the better sort; if of meaner condition, he was hanged on the Cross, or cast unto Wild beasts, that was himself like a Tiger amongst men; *Simler*. And the reason of the severity was, because Murtherers deface the Image of God in Man (*d*), and lay violent hands to take away his temporal

(*d*) *By Murther a reasonable Creature is lost, which all the World cannot restore. Trees, though they be cut down grow again, but a Man once slain can never be recovered.* Pericl. apud Plut. in ipsius vita. *And for the most part, unless the Mercy of God be the greater, the Soul is lost with the Body.*

life,

life, for whom Christ died to give eternal life. A King (an inferiour god) would take it ill to have his Image, his Picture, wilfully stab'd through and cut in pieces by any, because it is his. It is very plain, by the Judicials of God, that where there was any wilful smiting, or striking (though suddenly, and from a present passion, occasioned by a sudden provocation) whereby death followed, in which the will, fury (which is a temporary madness) assent, or assault of the Manslayer, might appear, there was no City of Refuge, or Mercy, by Gods Law provided for it; only what was done unawares, and unforeseen (as aforesaid) found a City of Refuge, otherwise what can be meant by those words, *unawares*, and where *he saw him not:* and in these very Cases of killing another, *ex improviso*, unawares, or by misfortune, for whom there was a City of Refuge provided (by God himself) yet there the Avenger

Avenger of blood, if he overtook the Manſlayer before he got to a City of Refuge (and in ſome places it was many miles to one of them) he might juſtifie the killing of him.

During the *Iſraelites* ſojourning in the *Deſert*, the Tabernacle (where mention is made of the Altar) was their Refuge in ſuch a caſe; afterwards in the Land of (*e*) *Canaan* there were ſix Cities of Refuge appointed, three beyond *Jordan*, and three on this ſide. Three other (*f*) Cities of like nature God promiſed the *Iſraelites*, upon condition of their obedience, after their Coaſts were enlarged; but it ſeems their *diſobedience* hindred the accompliſhment thereof, for Scripture mentioneth not the fulfilling of it. The manner of Examination of one that fled to the City of Refuge was

(*e*) Bezer *of the* Reubenites, Ramoth *of* Gilead *of the* Gadites, Golan *in* Baſhan *of the* Manaſſites; *theſe three on this ſide* Jordan, Deut.4.41, 43. *theſe three appointed by* Moſes.
(*f*) Cadeſh *in* Galilee *in Mount* Naphtali, Shechem *in* Ephraim, *and* Kiriatharba *which is in* Hebron *in the Mountain of* Judah; *theſe three laſt were beyond* Jordan, *and appointed by* Joſhua: Joſh. 20.7. *equally diſtant one from another in* Canaan. *R.* Salom. Jarchi, *Deut.* 19.3.

was thus; The Consistory or Bench of Justices who lived in that quarter where the Murther was committed, (*g*) placed the party, being brought back from the City of Refuge, in the Court or Judgment Hall, and diligently enquired and examined the cause; who, if he were found guilty of voluntary Murther, then was he punished with death; but if the fact were found casual, then he was safely conducted back again to the City of Refuge, where he enjoyed his liberty, not only within the Walls of the City, but within certain Territories and bounds of the City, within such limits until the death of the High-Priest (that was in those days) after whose death he was at liberty; *Josh.*20.6. By this means the offender, though he was not punished with death, yet he lived (for the time, although the offence was involuntary and *præter intentionem*) a kind of Exile for his own humiliation, and for the abatement of his wrath who was

(*g*) Paul.Fag. *Numb.*36. 6.

20. Joshua 6.

was the Avenger of blood. (*d*) The *Areopagitæ* had a proceeding against *casual Manslaughter*, not much unlike, punishing the offender ἀπειτοιπσμῷ, with a years banishment. It is not agreed amongst Expositors, why the time of this Exilement was limited to the death of the High-Priest at that time: but probably thought, that the offender was therefore confined within that City, as within a prison, during the High-Priests life, because the offence did most directly strike against him, as being amongst men, ἀρχῆς, *ac Princeps Sanctitatis*, The chief god on earth. These places of Refuge appointed by God, differed from those of *Hercules*, and *Romulus*, and others, Heathens, yea, and Christian Kings formerly of this Nation, because God allowed safety only to those who were guiltless in respect of their intention: but the others were common Sanctuaries (*h*), as

(*g*) Masius *in* Josh. *cap.*20.

(*h*) Asylum Sanctuarium. *In the time of King* Henry 8. *these were places of Sanctuary; All Parish Churches, Cathedral and Collegiate Chappels dedicated, and their Churchyards and Sanctuaries to them belonging; and* Wells, Westminster, Mancheſter, Northampton, Norwich, Darby, *and* Lancaster. *Afterwards, in the same Kings Reign*, Mancheſter *was determined and* Westcheſter *appointed*, Westcheſter *discharged and* Stafford *appointed, by Letters Pat. from the King.* Stamf. *fol.*116.

well

well for the guilty as the guiltless: If any man did fortuitously, or by chance kill another man, in such a case, a Liberty was granted unto the offender to flie, at first unto the Altar for Refuge, as is implied by that Text of Scripture, *If any man come presumptuously unto his Neighbour to slay him with guile, thou shalt take him from mine Altar.* Exod.21.14. (i).

(i) *These places of Sanctuary extended not to Treason, wilful Murther, Rape, Burglary, Robbery, Sacriledge, Burning of Houses and Barns with Corn, &c.* 32 H.8.12. 33 H.8.15. *It seems they did extend to all these offences before these Statutes. All Statutes made concerning Abjured persons and Sanctuaries, made before* 35 Eliz. *were repealed by the* 1. *of King* James *c.*25. *Clergy is since taken away by several* Statutes *for those offences aforesaid, for which Sanctuary by the aforesaid* Statutes *was taken away.*

And it is thought that Temples, as they were built, had the like priviledge; as, *Joab fled to the Temple, and took hold of the horns of the Altar.* The Reasons why the Lord appointed Cities of Refuge are principally these; First, lest that the Innocent party might be slain, by the Friends of him whom he had killed, before

his cauſe was heard, and the manner of the ſlaughter determined by the Judges. Secondly, it was ſo appointed, that he might ſtay there to the death of the High-Prieſt, who was a type of our Bleſſed Saviour, by whoſe precious death we are all ſet free. Thirdly, this was done *ut menti eorum (hac ratione) medeatur, &c.* to heal and allay the mind and fury of thoſe which otherwiſe would delight in murther; for by his abſence and continuance of time, the rage of thoſe that ſought his life would be qualified, and therefore God provideth, that they ſhould not ſtill be provoked by the continual ſight of him. Fourthly, and further by this, that he that killeth a man unwittingly is appointed to flie, it is ſhewed (*quod reus pœnæ efficitur*) that yet he is guilty of ſome puniſhment. So that involuntary killing was puniſhed with a kind of Baniſhment among the *Iſraelites:* So likewiſe amongſt the *Athenians*, ſuch kind of

of Manslaughter was censured with one years Exile. And so among the *Israelites*, he that escaped from the Avenger of blood for it was but an escape) was not to go out of the limits and bounds of the City, if he did, it was lawful for the kinsman of the man that was slain to kill him.

There is a manifest distinction of voluntary and involuntary Murther or killing, grounded upon the Law of *Moses:* Involuntary killing is of two sorts, there are ἀτυχήματα, *chances unlookt for* and *sudden events*, as when one shooteth an Arrow (upon a lawful account, and killeth one unawares, as *Peleus* killed his Son, being in hunting with him. There are besides these, ἁμαρτήματα, *errours* and *oversights*, as the Father beateth his Child, purposing only to chastise him, and do him good, and he dieth of it. There are likewise two kinds of voluntary or wilful Murther, *ex proposito*, of *purpose*, & *ex impetu*

animi, in *heat* or *rage*; these kind of Murthers are called ἀδικήματα, *Iniquities*, one may be slain *ex proposito*, purposely, *per insidias*, by lying in wait, when one watcheth for the life of a man, and taketh him at advantage, as *Joab* killed *Abner*, and afterwards fled to the Temple, and took hold of the Horns of the Altar, which notwithstanding could not priviledge him; and afterwards killed *Amasa*, they suspecting no such thing; so *Ismael* killed *Gedoliah*: or else *per Industriam*, when one of set purpose picketh quarrels, and seeketh occasions to provoke a man that he may kill him. Both these kinds are touched here, *Tostat. quæst.* 16. Then one may be killed in heat and rage when there was no purpose before, as *Alexander* the Great killed *Clitus*. This kind though not so grievous as the other, yet is a kind of voluntary killing, for whom there was no mercy by Gods Law, as it is in the Margent of the Great Bible, *Wilful Murther*

Murther cannot be pardoned without Gods high displeasure. Nay, as it is more fully in the Text it self, (*k*) *Thine eye* (though the most compassionate sense) *shall not spare him, but thou, whoever thou be, shalt put away innocent blood from* Israel, *that it may go well with thee.* Now the putting away of Innocent blood is by revenging it on him that spilt it, as it is in the 10. v. of the same Chapter, *That Innocent blood be not shed in the land, which the Lord thy God giveth thee to inherit, and so blood come upon thee*; that is, that the Blood of the party slain be not imputed to thee: This Imputation of blood, which is of more weight than the Imputation of all *Adams* sin, because the command is more immediate and legible to us; it concerned all the *Israelites* in general, but more especially doth it concern those chosen by Law to make Inquisition after (*l*) Innocent

(*k*) 19. Deut. 13.

(*l*) Polluitur & fœdatur terra, *Numb.* 35. 30. 33. *Ye shall take no satisfaction for the life of a Murtherer which is guilty of death, but he shall be surely put to death; for ye shall not pollute the Land wherein you are, for blood defileth the Land, and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it.*

blood unlawfully and wilfully ſhed as principally Grand Jurors are; for whoſe ſakes, and that the following diſcourſe may fix the better upon their Judgments, and thereby make a right impreſſion upon their Conſciences to be more circumſpect and careful in their Preſentments in caſes of Blood, I have premiſed (as I conceive) what was the will and Law of God (as he himſelf hath declared it, and left it upon Record to us in his Judicials to his people *Iſrael*) who received Laws and Judgments from God himſelf for their whole model and ſyſtem of Political Government; agreeable to which I might add the mind of our Saviour Chriſt under the Goſpel (who is the beſt Interpreter of the Law) in bidding *Peter* put up his Sword (*m*), and his interpretation upon the ſixth Command, *He that is angry with his Brother* unadviſedly *ſhall be* culpable *of Judgment* (*n*). I ſhall

(*m*) Matt. 26. 52.

(*n*) Matt. 5. 22. *Qui iraſcitur ſine cauſa, quantum ad voluntatem, homicidium fecit.* Chryſoſt. *hom. in* Matt. *Ira eſt appetitus ultionis.*

in

in the next place endeavour to manifeſt, how parallel the Laws of *England* have been, and are, to the Judicial Laws of God in the puniſhing of Murther and ſhedding Innocent blood, and extending mercy where it is done *præter intentionem*, unawares and by misfortune, or in the neceſſary defence of a mans own life or property, and what *Aſylum* is provided for ſuch; and how the courſe and practice of the Laws of *England* ought to be, in preſenting and making Inquiſition (by Grand Jurors) after the ſame.

Not to look ſo far back to find what the Laws were (in caſe of Felony and Murther) as to the time of the *Saxons* (o) Heptarchy in *England*, when the Monarchy had many heads, being *Bellua multorum Capitum*; and ſo for the moſt part had ſo many ſeveral Laws, each Prince either pleaſing his own humor, or adapting his Laws to the condition and quality of the people he had to govern,

(o) Kent, South-Saxons, Weſt-Saxons, Eaſt-Saxons, Eaſt-Angles, Northumberland, Mercia.

which as they differed in their qualities and constitutions, as much as the several Winds differ the several Climates from whence they blow, out of the four Corners of the world, from whence many of their Kingdoms were differenced and distinguished by names; so did they differ in the nature and quality of their Laws: some of the *Saxon* Kings had excellent Laws, as *Ina*, as saith Venerable *Bede* (*p*), who flourished in that Kings time. The mulct or breach of Peace was forty shillings in the *Mercian* Law. In the *West-Saxon* Law, fifty shillings. The punishment of a Free-man was pecuniary, and loss of liberty, of a slave by whipping. Treason against the Lord was Capital, and could not be appeased with mony. Amongst the Laws of *Canutus* the King it is said, (*q*) *Si quis in Regia dimicaret, Capitale esto, nisi quidem Rex hoc illi crimen condonarit.* If any should quarrel or fight in the Kings Palace it was Capital, except

(*p*) L. 7. c. 16. & l. 5. c. 4. p. 375.

(*q*) L. *Canut.* fol. 117. c. 56.

except the King remitted the fault. They were unwilling to put any man to death, becauſe of leſſening their ſtrength, being ſo much divided that for the moſt part there was an *æſtimatio capitis*, a certain ſum of mony, or Corporal puniſhment ſet upon every Murtherer and Felon, reſpecting the quality of the perſon killed, or he that killed him; yet amongſt them there was ſtrict inquiry after Blood, by puniſhing the offender according to their Laws.

And to look for it amongſt the *Danes*, and their Laws, would be to as little purpoſe; for as it is well obſerved by Mr. *Lambert* (*r*), *Temporibus vero Regum* Danorum *ſepultum fuit Jus in regno*, *Leges & Conſuetudines*, *ſimul ſopitæ*, *temporibus eorum prava voluntas*, *vis*, *& violentia magis regnabant quam Judicium in terra.* In the time of the *Daniſh* Kings, Right was buried, Laws and Cuſtomes were laid aſleep together, the depraved Will, Strength and Violence

(*r*) Lambert *L.* Edw. Confeſſ. c. 16. *de Inventione Murdri.*

lence did reign and rule more than Judgment in the land.

Yet to make some amends we have it by good Tradition, that good St. *Edward* the *Confessor*, the last King of the *Danes* that was King of *England*) yet of *Saxon* blood, Collected out of the *Danish*, *Saxon*, and *Mercian* Laws, an universal and general Law (whence our Common Law is thought to have had its original) which may be true of the Written Laws, not of the Customary and unwritten Laws, these being certainly more ancient. Some say, that *Edward* the Third, before the Conquest, set forth the Common Law, called the *Laws of Edward* to this day, which St. *Edward* espoused as his Act, and falling last upon the work He carries the name. One says King *Canute* composed our Common Law, which St. *Edward* the *Confessor* observed. This King *Edward* the *Confessor* was in his life of that Holiness, that he received power

Ranulph. Cestr. l. 1. c. 550. *Hov.* 600. *L. Ed.* c. 35. in *Hoved.*

Malmsb. de gest. reg. l. 2. c. 11.

power from above to cure many Diseases, amongst others the swelling of the Throat (called by us) *The Kings evil*; a prerogative that continueth hereditary to his successors, Kings of *England*, to this day; the powerful effect whereof hath been most eminently manifested by the Touch of our most gracious King that now is (since his happy Return into *England*) upon very many thousands; some (to my knowledge) that formerly derided that occult personal Kingly vertue, inherent to the Imperial Scepter of *England*, being of St. *Thomas* his faith, that would not believe except they felt, now remaining fully satisfied of the truth thereof from their own experience of the cure upon themselves. K. *CHARLES* the *Second.*

The aforesaid St. *Edward*, for his holiness, charity, and good actions, was Canonized for a *Saint*, having reigned over *England* twenty four years. The Kings of *England* at this day, in their Coro-

Coronation Oath taken at the high Altar, ſwear eſpecially to obſerve and keep the Laws of this St. *Edward*. Theſe Laws ſo collected by this holy King *Edward*, were by *William* the *Conquerer* (to whom he had bequeathed this Kingdom of *England* by Will, though afterwards he was forced to get it by the Sword) confirmed in theſe words, *Hoc quoque præcipio ut omnes habeant & teneant legem Regis* Edwardi *in omnibus rebus*, as Mr. *Lambert* hath it, *inter leges Gulielmi*. Notwithſtanding he informs us, that this King *William* (*poſt acquiſitionem Angliæ*) after he had obtained and ſetled the Kingdom in peace, in the fourth year of his Reign, *Concilio* (*s*) *Baronum ſuorum*, by the advice of his Nobility, he cauſed to be ſummoned throughout *England*, the Nobles, Wiſemen, and ſuch as were skilful in the Laws, Rights and Cuſtomes of *England*, and elected twelve Knights out of every County, who

An. Dom. 1087.

(*s*) *Nobilium.*

who were sworn before the King to make a true Collection of the said Laws and Customes. *Nihil prætermittentes, nil addentes, nil prævaricando mutantes.* Amongst these Laws we do not find Murther punished with death. It being so near the time of the *Danes* and *Saxons*, it seems he made no violent alteration of their Laws, but kept their custome of *æstimatio Capitis*, or Corporal punishment. We find amongst his Laws these words, (*t*) *Interdico etiam ne quis occidatur vel suspendatur pro aliqua culpa sed eruantur oculi, & abscindantur testiculi vel pedes vel manus, ita quod truncus vivus remaneat in signum proditionis & nequitiæ suæ* (*u*). I command that none be killed or hanged for any offence, but that his eyes be put out, and his Testicles,

(*t*) *Lamb.* inter Leges *Gulielmi* Regis *fol.* 126.

(*u*) *By the ancient Law of* England, *he that* mahimed *any Man whereby he lost any part of his body, the Delinquent should lose the like part; as he that took away another mans life should lose his own,* Bract. lib. 3. numb. 4. *So if the Defendant in an Appeal of* mahime *should be found guilty, Judgment against the Defendant should have been, That he should lose the like Member that the Plaintiff lost, by this means, a hand for a hand, &c.* 40 Ass. 9. Mirror *c.* 4 & 5.

or

or feet, or hands be cut off, so that the Trunk of his body may remain alive; in token of his Treason and wickedness: any punishment then, but loss of life and banishment, for it is said amongst his Laws, *Prohibeo ut nullus vendat hominem extra patriam.* I forbid that any person be sold out of his Country.

Now although that these kinds of punishments are not commensurate to the offence, or to the Law of God, or to the Laws of *England*, in cases of Murther, there being not life for life; yet who is there almost amongst the Sons of men, that would not rather chuse to be hanged, than to have his eyes put out, his Testicles, feet, and hands cut off, and to survive with such a brand of Ignominy. (*x*) Amongst the Laws of the Conquerer, in the Title *Lex Murdrorum*, it is there found; If any be found Murthered, the Village in whom he was so found, was within eight days

(*x*) *Lamb.* in leges *Edvardi* R.c.15. Lex Murdrorum. v.*Stamf.*lib.1. fol.17.

to

to deliver the Murtherer; *Justiciæ Regis*; if he were not found within one Month and a day, the Village was to pay forty marks; if the Village were not able, then the Hundred was to pay it, and this mony was to be sealed up, under the Seal of a Nobleman of the County, and sent into the Exchequer, there to remain a year and a day, to the end, that if the Hundred or Village could within a year and a day bring the body of the Murtherer to Justice, they should have their mony again; if they could not within that time take him, the Parents of him that was murthered should have six mark, and the King the rest; if he had no Parents, then his Lord or Master should have it; if no Lord or Master, then (*y*) *Selagus ejus*, i.e. *fide cum eo ligatus*, that is, his Pledge or Surety; if he had none of these, then the King should have all the forty Marks (which was as much then as five hundred pounds now) *sub cujus*

(*y*) His Pledge or Surety.

cujus protectione, & pace degunt universi; If the Murtherer were found, and would not defend his Innocency, *Judicio Dei, scilicet aqua, vel ferro*, that is, stand in hot scalding-water, or pass barefoot over hot-bars of Iron, *fieret de eo Justitia*, let Justice be executed up on him; but what this Justice was, or what punishment he should suffer, some doubt there is: (z) Some say it was *ad voluntatem Regis*, or the usual way of *æstimatio Capitis*, or Corporal punishment, and not to suffer death, because (as before is observed) there is found amongst those Laws, *Ne quis occidatur, vel suspendatur, pro aliqua Culpa*; though others are of another Judgment, that it was Capital if the King pleased, whatever the punishment was; you shall not read of any Insurrection or Rebellion before the Conquest, when the view of Frank-pledge, and other

(z) *That is, so much as one paid for the killing of a man; by which it appeareth, that, such Government was in those days, as slaughters of men were most rarely committed, as Mr.* Lambert *collecteth.* Lamb. Expositio verb. *Estimatio.* Flet. *lib.* 1. *c.* 42. Hoved. *fol.* 344.

other ancient Laws of this Realm were in their right use.

There are many that are full of Sr. *Thomas Moore*'s kindness, and think it too much that a man should lose his life for crimes under Murther, as for Theft, &c. (but none so kind to a Murtherer) for which anciently a loss of a Hand, Eye, Leg, or other member was in use; yet the party taken in the manner, *hand habend.* having the stoln thing in his hand, in his possession, might be killed amongst the *Saxons*, he could not buy his Crime out; and the *Spanish* condemning to the Gallies, is thought by some the only way. Mr. *Daniel* will have it, that *as yet* (writing of King *Henry* the Second's time) *they came not so far as Blood*, which is not so; for King *Henry* the First (*a*) (abrogating the *were-gilde*) by which a man might have bought out his offence, made a Law, says *Hoveden*, *Ut si quis in furto*

(*a*) Hoveden *saw.* 471. *in* H.1. *Concil.* Birghamstead. *Concil.* 197. *L.K.* Canut. *c.* 61. *L.K.* Ina 5, 37. Æthelst.

furto vel latrocinio deprehensus fuisset suspenderetur; to hang the Thief: with whom *Vigorniensis* and *Rad. Niger* agree. And the Lo. *Coke* observes in the third *Institutes*, that before the Reign of King *Henry* the First the Judgment for Felony was not alwaies the same, but King *Henry* the First ordained by Parliament, that the Judgment for all manner of Felonies should be, that *he should be hanged by the neck until he be dead:* After, in the latter end of the Reign of King *Henry* the Third, we find a Thief who had stoln twelve Oxen beheaded. Capital punishments have not only been in use against Homicides and Felonies, but other Transgressors also, and amongst those who worshipped God rightly (as is well observed) we meet with no Divine precept before *Judah*, which makes Whoredom worthy of death, yea, when he is told, Tamar *thy Daughter in law hath played the Harlot*, he answers; *Bring*

9 H. 1.

Matth. Paris. *continuat.* 1005.

Bring her forth and let her be burnt. (*b*) Amongst the *Britains*, if the Wife killed her Husband she was to be burnt; so are the *English* Laws to this day. *We may proceed* (says *Grotius*) *by conjecture of the Divine will, with the help of Natural reason, from like to like, and that which is a Law against Felonies and Murthers, may be extended to others as dangerously mischievous: It is a hard dispute, whether there be more mercy in death, or putting out of Eyes, cutting off Legs, Arms, &c. or in the Gallies. It is believed, that the boldness and number of Malefactors begot the Law of death, and those whom Death with so much Infamy (so often reiterated before their eyes) cannot fright, will never think any Torment whatsoever (where life is left them, though with more misery than can be spoken) ter-*

(*b*) Cæsar's *Comment.* l. 6. *ante Christum natum* 1600 *annis.*

rify!

It is well observed by the Lo. *Coke*, that, *Videbis ea sæpe committi, quæ sæpe vindicantur.* Those offences are often committed, that are often punished; and he gives his Reason for it, That the frequency of the punishment makes it so familiar, as it is not feared. *For Example* (saith he) *what a lamentable case it is, to see so many Christian men and women strangled on that cursed Tree of the Gallows, insomuch, as if in a large field a man might see together all the Christians, that but in one year, throughout* England, *come to that untimely and ignominious death, if there were any spark of Grace, or Charity in him, it would make his heart to bleed for pity and compassion.* I my self have known at one Assizes in the County of *Monmouth*, where one hath had Judgment to die for stealing a Horse, and Reprieved, in order to procure his Pardon; another narrowly acquitted of a Felony, and made use

Coke 3. *Instit. Epilog.*

Sta. perlege plor.

uſe of by the Goaler, to be the Common-Hangman at the ſame Aſſizes; that both theſe perſons (the one breaking the Goal, the other having his liberty, as being acquitted) were both taken in one Felony and Burglary before the next Aſſizes, committed to the Goal, and received Judgment of death, and were both hanged together. So little doth favour, terrour, or example work a Reformation upon thoſe that are hardened in their ſins, and want grace to make good uſe of them.

But it is thought horrible and grievous, that a mans life (the life of a Chriſtian) or any of the Members of his body, ſhould be taken away for ſo ſmall a value as thirteen pence (I take twelve pence to be but petit Larceny, for which he ſhall be whipt) it is very plain that the Statute of 3 *Ed.* 1. *c.* 15. declaring what Priſoners are Mainprizable, or Barable, ſays amongſt other offences (*viz.*) *or* 3 Ed. 1. 15.

for Larceny, which amounteth not above the value of twelve pence: nay, for leſs. King *Æthelſtanes* Laws begin with Thieves, and ſpeak thus; *Firſt, that a man ſpare no Thief who is in the manner, having in his hands taken above eight pence* (it ſeems eight pence then was in the nature of a Petit Larceny;) a Ram in the *Saxons* time was worth but four pence: that which was heretofore ſold for twelve pence, would now be worth forty ſhillings.

In the Aſſize of Bread (long after the *Saxons*) in the 51*th* of *H.* 3. eight Buſhels of Wheat are valued but at twelve pence. In *Edward* the Third's time a Buſhel of Wheat was but ten pence; a Haymaker had but a penny a day, Reapers of Corn two pence, an Acre to be mowed for five pence, Threſhing a quarter of Wheat or ie but two pence, a Maſter-arpenter three pence a day, and is man two pence, a Free Maſon ur pence, others three pence, their

their Boys one penny, Plaisterers and their Knaves (so named in the Act) the same manner, and to find themselves meat and drink. See the Statute 25 *E.* 3. *c.* 1, and 3. And by the Statute made the *6th* of *H.* 8. of much later time, the wages of a Bayliff of Husbandry was but sixteen shillings eight pence, and for Cloathing him five shillings with meat and drink, a Chief Hinde or Shepherd twenty shillings, and for his Cloathing five shillings, every Common Servant sixteen shillings eight pence, for Cloathing four shillings, no Woman Servant above ten shillings, her Cloathing four shillings, and no Master might have given more. 25 Ed. 3. c. 1, 3.

And although *twelve pence* keeps not the old Rate, but the Modern, yet things are prized in trials of Life far below their worth, and no man loseth his life (in a single and simple Felony) but where the thing stoln riseth to more than many twelve pences

(especially after the Old estimate) but indeed the quality of the Offender, circumstances of the offence, and of the times, are mainly considerable in our Law, where any mans life is taken away in such a Felony.

But to return to our proper Subject, and to manifest what the Laws of *England* were (in Cases of blood) not long after the Conquerer, and how tender a regard the Law of *England* (answerable to the Law of God) had of the Life of man. By a Canon of our Old *English* Church, he that killed a Man in publick war (though justifiable) was enjoyned a Penance of forty days. (c) By the Common Law killing by misadventure, unawares, or in a mans own defence was Murther, founded upon the Judicial Law, before the Cities of Refuge; and the forfeiture and punishment of both was, as in case of Murther, as appears plainly by the Statutes of *Marlebridge* and

Concil. Saxon. 383.

(c) Misadventure *at the Common Law adjudged Murther*, Stamf. *fol.* 16. *c.* 8.

and *Glouceſter*; the Forfeiture of Goods and Chattels remains as yet: The words of the Statute of *Marlebridge* 52 *H.* 3. are as fol- 52 H. 3.
loweth, *Murther from henceforth ſhall not be adjudged before our Juſtices where it is found Miſfortune only*; which ſhews, before that Statute though a man were killed by Misfortune, he had the ſame Judgment in Law as for Murther: So that after the making of that Statute until the *6th* of *Edw.* 1. Writs were granted 6 Ed. 1.
of courſe, where there was a ſurmiſe that the man was killed by Misfortune, or, *ſe defendendo*, or in any other manner, where the killing was not Felony, and thereupon a Pardon of courſe, or Grace, was granted to the party, who only forfeited his Goods and Chattels, and by benefit of that Pardon, had only his liberty out of priſon, which without he could not have.

This

This way of Mercy it seems did stretch too far, and covered too many guilty persons (as I fear yet it does) under her wings, when as their several Cases were not judicially examined, indicted, and tried, before hand, by a Grand Jury, and a Jury of Life and Death before a Learned Judge (as in ordinary Trials of Criminals) whereby it came to pass that many Murthers and Manslaughters escaped under the favourable surmise of a *per infortunium*, or *se defendendo*, as if it were done by misfortune, or in his own defence, and so came off from a foul Murther by a Pardon of Course. Now for remedy in this case came the Statute of *Glouceſter*; the words of which Statute are as followeth;

6 Ed. 1. c. 9.

The King commandeth, that no Writ shall be granted out of Chancery for the death of a man, to enquire, whether a man did kill another by Misfortune, or in his own defence, or in any other manner

manner, without Felony; but he shall be put in prison until the coming of the Justices in Eyre, or Justices assigned to the Gaol-delivery, and shall put himself upon the Country before them for good and evil (that is, for life or death;) *if in case it be found by the Country that he did it in his defence, or by misfortune; Then by the Report of the Justices to the King, the King shall take him to his Grace (if it please him.)* The Report to the King is, to Certifie the Record into the Chancery, where the King is alwaies present; and therefore it is called a *Pardon of Course*, Stamford *fo.* 15. whereas the Kings own *hand* and *fiat* is to other Pardons. So that here it is very plain, that he that will be acquitted and discharged out of Prison for Manslaughter, *per infortunium*, or *se defendendo* (*ex Gratia Regis*) must first put himself, *super Patriam*, upon the Country *de bono & malo* (the very words of the Act) and that is upon

Stamf. *fol.* 15.

upon a Jury of Life and Death; and this he cannot do except the Grand Jury find the Bill of Indictment, Murther or Manslaughter, let the matter of fact be what it will; for if the Grand Jury shall but find the truth of the fact, as it appears in evidence to them, or from their own knowledge (which is that which they now so much stand upon, that is the very special matter that makes it Manslaughter, by misfortune or *se defendendo*) the party can never come to be Arraigned upon such an Indictment, for that is not Felony, and if he shall be charged with it (the Grand Jury having only found the special matter in the Indictment or Inquisition) the party must either plead *guilty*, or *not guilty*, either confess and justifie the Fact, or deny it; if he confess, he cannot Justifie it, for mens lives are so precious in the eye of the Law, that the death of a man cannot be Justified, except in course of

of Justice, in a lawful War, or in a just defence of a mans life and property, against such as would rob, or designedly murther him. The Defendant in Appeal cannot Justifie the death of a man at his own suit, *se defendendo*, but must plead *not guilty*. Nay, a Verdict of the Jury of Life and Death, that *A* killed *B se defendendo*, or *per Infortunium*, is no good Verdict; the special matter must be set down in writing by them, that the Court may judge the killing to be upon inevitable necessity; neither Grand Jury that hears but one side, nor Jury of Life and Death (that hear both sides) are Judges in this case. For, upon the special matter found by the Jury of Life and Death, if the Court shall not adjudge that special matter good in Law to acquit him of Murther or Manslaughter, it may be either murther or manslaughter in him, and the party may be hanged notwithstanding such Verdict of the Jury of Life and

Br. *Appeal* 122.

Coron. 302.

43. *lib.* Ass. *p.* 31.

Stamf. *lib.* 3. *c.* 9. *fol.* 165.

and Death, how can the Court be judge of the matter in Law, when they hear not the matter in fact from the Witneſſes on both ſides, and the Parties defence for himſelf, which they can never do, if the Grand Jury ſhall take upon them (as they preſume they may) to find the Special matter themſelves, whereby the Party cannot be Arraigned, that ſo he may put himſelf *de bono & malo ſuper patriam*, as the Statute of *Glouceſter* before-mentioned eſpecially requires. If the Party charged with ſuch an Indictment from the Grand Jury (where they will find only the Special matter) ſhall confeſs it, when he is charged with it (as ſure he may) then the Evidence can never be heard in Court, whereby the Judge may determine the point in Law, whether the offence upon the whole matter be Murther or Manſlaughter, or as they find it, and that is meer matter of Law, whether *ſuper totam materiam* of the Evidence (and

(and that must be Evidence on both sides) it be murther, Manslaughter in general, Manslaughter upon the Statute *per Infortunium, se defendendo*, justifiable as against a Thief, or *in loco & tempore belli*; and how exceeding dangerous and inconvenient were it for Grand Jurors, so far to anticipate the Judgment of the Court, and to take upon themselves (upon the hearing only of Witnesses on one side, and perhaps not all of them neither) the sole Judgment of Law in all these Cases, by not finding the Indictment (which is but the Kings Declaration for the loss of his Subject, in the same manner as it is advised by the Kings Council Ingrossed, sworn in Court, and delivered to them) especially (for that is alwaies intended) where they have probable Evidence (for they need no more) to prove such a person killed by the hands of such a person, such a day, year, and place. Nay, by the Statute of *Glouceſter*, they must either find the

the Indictment in such a case Murther, for all Indictments (about the killing of a man) were so before that Statute, and no Law since to alter it, or the party can never have a *Certiorari* out of Chancery for his Pardon of Course, whereby he may be discharged out of Prison; for by the strictness of Law, he ought to remain in Prison without Bail until his pardon be procured, which Pardon saves not his Goods or personal Estate, but only pardons his Offence, his violation of the King's Peace (which is violated in the loss of a Subject) according to the Statute of *Glouce-ster*, and procures his liberty, and discharge out of Prison.

The words contained in the Writ of *Certiorari* out of Chancery, in order to the obtaining of a Pardon of Grace, and removing the Record into Chancery, that there the King may see by the Record the truth and nature of the offence, according to the Statute of *Glouce-ster*, being well observed make it very

very plain, that the Special matter of Fact must be found by the second Jury, the Jury of Life and Death, and which is so suggested in Chancery before the Issuing forth of such Writ, as by the Writ more fully appears, viz. *Quia ut accepimus, quòd* A. B. *indictatus, & per Inquisitionem patriæ compert. extitisset, quod idem* A *interfecit prædict.* C. *se def. & non per feloniam aut malitiam præcogitat. unde dictus* A. *Gaol. nostr. prædict. remiss. est ad gratiam nostram inde expectand. nos ea de causa super tenor. Record. & proces. Inquisitionis præd. Certiorari volentes, vobis mandamus quod si ita est, tunc tenor. Record. pro proces. prædict. cum omnibus ea tangent. in Cancell. nostram sub sigillis vestris distincte & aperte mittatis.* Observe how this ancient Writ complies with, and explains the Statute of *Glouc.* in this case; here is in it *Indictatus*, that is, by the Grand Jury, and *per Inquisitionem patriæ compert. extitisset*, that is, the Jury of Life

Certiorary out of Chancery.

and Death; for that is the only Trial in our Law, by the Country, *per Patriam*; and whoever is tried by that Jury, *posuit se de bono & malo super patriam*, which must be for Felony and Murther, the very words of the Statute; for this Jury is to find, in their Writ, that it was *se defendendo & non per felon. aut malitiam præcogitat.* as it is in the Verdict; and observe by the Writ, he is not to be discharged out of Gaol before his pardon of Course procured, for it is in the Writ, *Gaol. nostræ præd. remiss. est* (it seems he was there before) *ad gratiam nostr. inde expectand. &c.* and further, observe the *Mandamus* in this Writ (*si ita est*) if it be so, that the Offence hath received such a trial by two Juries, then Certifie the Record, otherwise not; and what Judge that doth not truly understand this (*si ita est*) which he can never truly do from a Grand Jury, will Certifie such a Record in Chancery, to the King himself, in Cases of Blood.

By

By this it may appear, to all that are rational and unprejudiced, that have not formerly asserted the contrary Opinion, and therefore like the Opiniators of this Age, will (for no other reason) maintain it, That Grand Jurors are not left so free herein, to find what they please, or as they would have it, strictly according to their Evidence, as the Gentlemen of these latter times have taken upon them to do, and even to stand upon it, against the Learned Judges themselves, and their Directions and Advice. Besides, how greatly do they injure the party accused; for if he be Guilty of no higher an Offence than Manslaughter *per Infortunium*, or *se Defendendo*, and the Grand Jury will not find it Murder, whereby he may put himself (as the Statute of *Glouceſter* directs, *de bono & malo ſuper patriam*) he can never by a pardon of course, receive a total and final discharge from the said Offence. For if he should be Indicted at any

time again of Murder for the death of that Party (as he may be at any time after, during his life, notwithstanding such pardon, where it was not found Murder or Manslaughter at the first) he can make no Plea to such Indictment, in discharge of it: he cannot plead *auter foits* Acquit, or Convict, or Attaint of the same Offence, because he never put himself *de bono & malo super patriam*, upon his Country, his life was never in hazard for it: whereas, if he have been once presented by the Grand Jury for Murder, and thereupon Arraigned, received a full Tryal, and according to the Statute of *Glouceſter*, had been acquitted of the Murder, and the special matter of *per Infortunium*, or *ſe Defendendo* found in their Verdict (which by the Law ought to be so found by the Jury of Life and Death) under their Hands, that the Judge (upon hearing the whole matter) may be satisfied it is found according to Evidence given

given in Court, and thereupon adjudge what that Offence is in Law. If in this case the party that hath received such a full Tryal, and hath sued out a *Certiorari* out of Chancery; and upon the Return of that, hath had the Special matter, the whole Record of proceedings certified by the Judge, before whom the Record remains, and thereupon hath procured his pardon of course out of Chancery; such person can never be called in question again for the same Offence, but he may plead that Record and Verdict of Acquittal from the Murder or Manslaughter, notwithstanding it might happen to be proved afterwards either Murder or Manslaughter, it shall discharge and acquit him for ever.

And if the Grand Jury (as in this case) ought to find every *per Infortunium* Murder (notwithstanding by the Evidence it appear no more to them) *à multo fortiori*, they ought to find every

Offence (that appears to them upon Evidence to be but Manslaughter) Murder. For the (*d*) *Bill* of Indictment, as it comes from their hands, is but the Kings Declaration of the matter of Fact, to which the Prisoner may plead, *Not Guilty*; and joyn Issue with the King, and have it tryed, Whether he be Guilty, or not? *modo & forma*, as it is laid in the Indictment, or may confess and justifie, as he shall find cause. For this Indictment or Presentment of the Grand Jury in the behalf of the King against the Prisoner, sets forth an Act done, *Vi & Armis*, against the Kings Peace, his Crown, and Dignity, all which are violated, dishonoured, & weakned in the loss of a Subject, in the shedding of Innocent Blood, by which his Land is defiled, and his Laws violated; and this according to the Laws of God and Man (*prima facie*) may be Murder, and therefore ought as

(d) *As in the two Houses of Parliament it is but a Bill whilst in their hands, the Royal assent makes it an Act. So it is but a Bill in the Grand Jury's hand, the other Jury makes it an Act.*

as well (as all Declarations at Law) to be set forth in the fullest circumstances of aggravation a Fact of Blood (which far exceeds all other Facts) will bear, especially in laying the ground work and foundation of the Charge, because it cannot heighten or increase, but may lessen and decrease, like the Moon in the full, to its lowest wane, even to nothing, upon a full Examination and Debate of the whole matter, by hearing of Parties and Witnesses on both sides, and receiving in the face and audience of the Court such a scrutiny and narrow search (as blood requires) into all circumstances and aggravations of the Offence, that are laid in the Indictment, by the Learned Judge (who is of Counsel as well for the Prisoner as the King, and must not let the Prisoner suffer for want of Counsel in Law) that a Grand Jury cannot possibly do, they hearing but only Witnesses on one side, and not the Prisoner; besides their want of Judgment

and Knowledge in the Law in all Cases of Blood: whereas, if the Grand Jury shall take upon them (which they ought not to do) to put out of the Indictment and Declaration of the King, the words *Ex malitia præcogitata*) the only words that make it Murder, the Court can never Judicially examine the malice, which is commonly a secret latent thing, carried on with a great privacy and cunning, and appears not in all cases of Murder expres, (and no Evidence can prove further to a Grand Jury) whereas the Law in many cases implies a malice to make it Murder (although the Parties never saw or heard of each other before) which lies not in proof of Witnesses, but ariseth as a point of Law upon the circumstances of the Fact, which, not a Grand Jury, but the Court is Judge of, being matter of Law, which Judgment in Law is wholly frustrated and taken from the Court, when the Grand Jurors put

put out these words, *Ex malitia præcogitata*, which only make it Murder, out of the Indictment. And by such favour, indulgence, or wilfulness in Grand Jurors, many times the greatest Murder escapes by a *per Infortunium*, *se Defendendo*, or at least by a Manslaughter. For if the Grand Jurors shall only find it Manslaughter, the Prisoner upon his Arraignment, presently (if he can but read, get any one to help him, or corrupt the Ordinary, no great difficulty to do) confesses the Indictment, and prevents all further tryal upon that Offence, and so neither the Judge, nor Court, can ever come to understand (although there be twenty Witnesses against the Prisoner) what Evidence the Grand Jury had to find it no higher than Manslaughter; nor shall ever come judicially to examine the nature, quality, or malice (if any be) circumstances, and truth of the Fact, although in it self the foulest

eſt Murder that can be (as my own above Forty years experience, attending the Crown Court in one Circuit under many Learned Judges, hath too often experienced) together with the common practice of labouring Grand Jurors to ſuch a Preſentment, and contriving with the Priſoner to confeſs the Manſlaughter, leſt the truth and foulneſs of the Murder ſhould too clearly manifeſt it ſelf (as truth ever will) upon a Judicial, faithful, and careful Examination of the Fact by the Learned Judge, upon hearing the Party, and Evidence on both ſides.

4 H. 4. 2.
37 H. 8. 8.

It is true (as appears by two ſeveral Acts of Parliament noted in the Margent) that at the making of thoſe Acts there was a complaint in Parliament, That Indictments were ſtuffed with more words than the Offence required, and that of purpoſe to aggravate the Offence more than it was grievous in it ſelf.

ſelf. For as it is well obſerved by Mr. *Poulton*, *That the circumſtances of every Offence do augment or diminiſh it according to the qualities thereof.* And by thoſe two Acts of Parliament it may be obſerved there was a reformation and redreſs made therein, by leaving out ſome formal aggravating words (but then material) uſed in thoſe times in all Indictments of Felony and Murther, as by the Statute of the 4th of *H.* 4. 2. the words then conſtantly uſed in all Indictments of Felony (without which the Indictments were not good) were [*Inſidiatores viarum & depopulatores agrorum*) provides that thoſe words ſhould be left out in all ſuch Indictments, and yet the Indictments ſhould be good without them: And well they might leave them out; for how uſeleſs and impertinent (as to the Eſſence of the Indictment) were thoſe words, and yet the effect of them muſt be ſtill obſerved. As alſo

(e) Poulton *de Pace Regis & Regni*, fol. 167.

4 H. 4. 2.

37 H. 8. c. 8. also by the Statute of the 37 *H.* 8. *c.* 8. the words, *Vi & Armis*, *viz. cum baculis, cultellis, arcubus & sagittis*, or such other like words (before time commonly used and comprised in all Indictments and Inquisitions of Treason, Murther, Felony, Trespass, and other Criminal Offences) shall not of necessity (for they were so before) be put or comprised in any Inquisition or Indictment; but it shall be good only with these words (*Vi & Armis*, &c.) leaving out the other against any advantage that may be taken (as formerly it was) by Writ of Error, Plea, or otherwise; for these words were to very little purpose, to be of necessity used in every Indictment: For as to some Indictments, there could be nothing of pertinency or congruity to the Offence in them. And yet let it here be observed by the way, That in those times, and before those Statutes formerly mentioned, continually (in all In-

Indictments) those words were used, and the Indictments found by the Grand Jurors, without any proof made to them of such circumstances (then essential) as [*Insidiatores viarum, depopulatores agrorum*] liers in wait to deceive upon the High-ways, and destroyers of Husbandry; or, as in the other Statute, *Cum baculis, cultellis, arcubus & sagittis, viz.* with Staves, Knives, Bows and Arrows; when perhaps he that committed the Offence had not one of these Weapons about him, or was guilty of the least of these circumstances of Aggravation, which were then held necessary to every Indictment; which shews how observable (at that time) Grand Jurors were to the directions of the Court, and to the Kings Council, in drawing the Indictments and Circumstances of it, Whether such Circumstances lay in proof, or no? But in neither of these Statutes, nor any other Statute, is there any

any Exceptions made to these words, in any Indictment for the killing of a man (*Ex malitia præcogitata*) then used in all Indictments for the killing of any person unlawfully, which (as is said before) are of great consequence and use to be put into all Indictments against any person that hath shed innocent blood. For, as Mr. *Poulton*, in the very Folio before quoted, saith, (*f*) (writing upon the two former Statutes last mentioned;) *If one be Indicted of Murther or Manslaughter, there must be of necessity in the Indictment, a stroke supposed, viz. tali die, & anno felonicè, & ex malitia præcogitata interfecit & murdravit.* Here it is plain, that the Indictment of Manslaughter, as well as Murther, must have these words, *Ex malitia*, &c. in it. Neither let any think that it is prest further, *in foro legis*, than it will bear *in foro conscientiæ*; or that by this means Grand Jurors are used but as

(*f*) Poulton *de Pace, &c. fol.* 167.

Poult. *ut supra*, 1. m. Dier. 59.

as Cyphers (like the Ordinary at the Assizes) *pro forma tantum*, and that the Arguments of Law and Reason here used, seem'd to perswade them (like those of the Church of *Rome*) to be of an implicite Faith, to believe as their Leaders would have them, and to do as they require them, and yet to be under the Obligation of an Oath to present the truth of the matter of Fact. It is far otherwise (being rightly considered) they are not sworn to try the whole truth of the Offence, so as nothing may be altered in what they find, for then there would be no need of another Jury; they are neither to convict the Party, nor determine the Law, Whether it be Murther or Manslaughter? or of what kind or *Species* it is, as it appears to them upon the hearing of but one side, and that but of Witnesses, not of the Party, that is left (as is said before) to the second Jury, who are properly Tryers of the

the Offence *de vicineto*) of the very Neighbourhood; not Inquirers only (as Grand Jurors from every part of the County) where Parties, and Witnesses, and Council, on both sides (if occasion be) may be lawfully heard. (g) The Grand Jury are only sworn to inquire, and true presentment make of all such things and matters as shall be given them in charge, to present nothing for malice, &c. nor leave any thing unpresented for favour, &c. From hence often Grand Jurors frame an Argument to themselves, that it is part of their Oath to present all such things as shall be given them in charge, that generally the Judges in their charges dilate upon the several *Species* and differences in Murther: As, what Offence the Law makes Murther? what Manslaughter at Common Law? what upon the Statute? what

(g) *Jurato creditur in Judicio. And to say the truth*, saith the Lord *Coke*, *we never read in any Act of Parliament, ancient Author, Book-case, or Record, that in Criminal Cases, the party accused should not have Witnesses sworn for him, and therefore there is not so much as* Scintilla Juris *against it.* Cok. 3. Inst. fol. 79.

what *per Infortunium*? what *se Defendendo*? what is malice expressed? and what is malice implied; and therefore wherever they find these specifical differences by their Evidence, they are so to present it, and not otherwise.

This is upon a great mistake, nor is it, or can it be so intended by the Judges; for although it is true that the Judges (for the most part, not all of them) in their charges to the Grand Jury (which I humbly conceive were better omitted) do, usually mention and branch out the several specifical differences and distinctions the Books of Law make in shedding of Blood, in Murther, and Manslaughter, I conceive, more to inform the whole Country, and to shew their Learning, and the Law therein, than intentionally that the Grand Jury should presently (some of them perhaps never serving before, *uno intuitu*) take it into the consideration

ration of their Oath, and make it the nice Duty of their Inquiry, which indeed they can never attain unto, or determine the Law therein, by only hearing of an Accusation of one side, from which they are only to prepare fit matter for the Court to proceed further upon, and to make a more diligent inquiry after. Such distinctions and directions from the Judge being much more proper for a Jury of Life and Death, when any Question of Blood comes before them to be considered of, and to be tryed and determined, who have the only means to do it, by hearing all Parties, all Evidence on both sides; as also the directions of the Court, as to the quality and nature of the Offence, to give them a true light to make a right distinction therein.

Finch 25. *Case of presentment and Indictment.*

It is well said by a Learned Writer of the Law; *An Indictment is an Inquiry finding some Offence against the King. It was the*

the Kings Action whereupon the Party shall be Arraigned, or put to Answer by the King, and tryed by another Jury. Every strong suspicion of such an Offence, though it be in case of Felony appearing of Record, hath the force of an Indictment, as in an Action of Tresspass for Goods carried away; if the Defendant plead, Not Guilty, and be found Guilty, he is a Felon, &c. (h) *So in an Appeal of Murther, if the Plaintiff, after Declaration be Nonsuit, the King shall proceed upon that Appeal, as upon an Indictment found:* So He. And as it is in (*i*) *Doctor* and *Student*; The Grand Jury is only charged with the effect of the Bill (*viz.*) whether he be guilty of the Felony or Murther in the Indictment, within the Shire, and not whether he be guilty, *modo & forma*, as in the Bill is specified. And so when they say *Bills vera*, they say truly

(h) *In ancient time it was usual to Arraign one taken in the manner without any Appeal or Indictment.*

(i) *Doctor & Student, lib. 2. cap. Abridgment.*

ly (as they take the effect of the Bill to be) so it is though the Bill vary from the day, year, and place, so it vary not from the Shire; as if there were false Latin in the Bill they might well say, *Billa vera*, for their Verdict stretcheth but to the Felony, not to the truth of the Latin.

There is very much difference in Law betwixt an Inquiry and a Trial, betwixt a Presentment and a Conviction; besides, the Judges do now give it in charge to the Grand Jurors, and so part of their duty (if not of their Oath) that when they have such an Indictment of Murther come to their hands, if they find upon their Evidence, that the party said to be slain in the Indictment, by the person there charged with it, with the time, and place, and manner how, they are to enquire no farther into the nature of it (what offence this is in Law) but to find it as it stands in the Indictment, which (for ought they know, upon

on a further and more clear discussion of it in Court) may appear as full, as it is laid in the Indictment; however it passeth fairly out of their hands, they may more clearly than *Pilate* wash their hands in Innocency from the Innocent blood of such a person, and very well discharge their Oath, the Law, and a good Conscience, letting it pass from them with the Indorsment of *Billa vera*, a Bill that hath truth in it, fit to be considered further by the Court and another Jury.

And as Indictments at the Kings Suit do succeed Appeals, at the parties Suit, so ought they to be drawn and presented as large and as full for the King, as an Appeal of death for the party, which ever was for Murther (if the party Appellant would so have it) and that may very reasonably be applied to Indictments that the Statute of *Glouceſter* directs in Appeals, *viz.* That no Appeal shall be abated so soon, as they

have been heretofore: But if the
6 E. 1. 9. Appellant in an Appeal do declare the Deed, the year, the day, the hour, the time of the King, and the Town where the Deed was done, and with what weapon he was slain, the Appeal shall stand in effect.

Now so great an exactness of the year, day, and hour, is not required in an Indictment, as in an Appeal (being the only violent prosecution of the party) in favour of life, many Niceties were stood upon more than in other Actions. And Mr. Justice *Stamford* says, A man is not of necessity compellable at Common Law at this day, to put into his Declaration the hour; the day was necessary to be put down in an Appeal; for if the Appellee can prove by certain Demonstrations and Testimony of credible Witnesses, that he was the same day at another place, at such a distance as it was not possible for him to be there the day of the committing

ting of the fact, or twenty miles off the same hour the murther was committed, the Appeal shall abate. Yea, so many were the Niceties of Appeals, which formerly were in use, not only in Murther, but in all cases of Felony, and so full of Bribery and corruption in the easie composition of all sorts of Murthers and Felonies, and did so much delay the Kings prosecution by Indictment (which was not to begin until the year and day past, after such Felony and murther) in which time commonly the Appellant grew slow in his prosecution, and was many times agreed with, and by the end of the year Witnesses were dead and gone, all was cold and forgotten, as also that the Appellant must sue in proper person, which suit was long and costly, and made the party Appellant weary to sue.

For remedy whereof the Statute of the third of *H.* 7. was made, That *the King shall not* 3 H.7.c.1.

ſtay until the year and day were paſt, but proceed at any time after the Murther *committed*; as alſo, that *the Appellant ſhall proceed in his Appeal by Attorney*; (all helps the Law could deviſe to prevent delays in caſes of Murther, and to find out and puniſh the blood-guilty perſon) obſerve the penning of that Statute (were there nothing elſe to be ſaid in this Argument) how neceſſary it is that all Indictments be made *Murther*, that are brought at the Kings ſuit within the year and day (as the King by this Statute is enabled to do, the words whereof are as followeth, *And if it happen, that any perſon named as principal, or acceſſary, be acquitted of any ſuch Murther at the Kings ſuit within the year and the day, that then the ſaid Juſtices ſhall not ſuffer him to go at large, but either remit to Gaol, or Bail him, at diſcretion, until the year and day be paſt.* And further in the ſaid Statute it is ſaid,

MURTHER.

3 H. 7. c. 1.

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If

If the MURTHERER *escape the Town shall be amerced*; as also, that *the Coroners shall return their Inquisitions before the Justices of Gaol-delivery, and they shall proceed against such* Murtherers; and as it is before in the said Statute, *The King shall not stay until the* year and day *were past, but proceed at any time after the Murther committed:* So that (*prima facie*) the Statute looks upon all Manslayers (unlawfully) to be guilty of *Murther*. And so the Indictment ought to be drawn, or they cannot be continued in Gaol, nor Bailed by this Statute until the year and day be out, nor the Town amerced for such escape, nor the offender proceeded against by the King, within the year and day by Indictment.

Now generally (in these days) since the making of that Statute, all proceedings in Murther and Felony are by Indictment at the Kings suit, not but that the prosecution by Appeal is still in force, and

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the party hath his election which way he will proceed, either by Appeal at his own suit, or by Indictment at the Kings suit; yea, even after the Trial had by the Kings suit (in some cases) although at the Kings suit they have been acquitted of the murther (but that the abuse of these and many other obsolete Laws) hath taken away the frequent use of them; except it be through the miscarriage of Grand Jurors, and Jurors of life and death, in cases of murther, the one in not fully presenting the murther, the other in not conscientiously giving a Verdict according to their Evidence, and thereby provoking the party (whose Relation is slain) to the nice and chargeable remedy of an Appeal; upon such Appeals several have been executed after they have been acquitted by trial at the Kings suit upon Indictment, one Woman in my time in *Berkshire*, for petty Treason for killing her Husband, after she had

had been acquitted for the same fact at the Kings suit by Indictment, was convicted upon the Appeal, and burnt at a stake.

Look how high the Appellant shall draw his Appeal against the Appellee or Defendant, as if for Murther; in this case, if the Appellant shall surcease to prosecute such Appeal, as by Nonsuit, Release, Retraxit, the Woman by marrying a Husband, *pendente lite*, or by the Act of God, as if the Appellant die, or by the Act of the Law, as if the Appellant take the priviledge: Now in all the former Cases, where the Appeal ceaseth by the Act of the Appellant (that is, he that prosecuteth the Appeal, after declaration in the Appeal) the Defendant shall not go at liberty, but shall be Arraigned upon the same Declaration at the Kings suit, for that it doth appear by the Declaration there is a Murther committed, and the year, day, and place, when, and where the same was committed, and the same

ſame is not tried; and the Law will not allow ſuch great Offences whereof it taketh notice) to be concealed and remain unpuniſhed, neither will the King at his ſuit ſuffer it to be extenuated into a leſſer degree of Murther, than the Appellant did: ſo careful have the Laws ever been in puniſhing of Murther, and revenging Innocent blood, which it ſeems (and as before is obſerved) whilſt Appeals were in uſe, and the Kings ſuit muſt ſtay until the year and day were paſt, many Murtherers eſcaped unpuniſhed, and the killing of men was made (as now it is) a trick of Youth, Valour, Hectoring, and Jeſt, in regard of ſo great impunity it found, by frequent Pardons, Indulgence of Grand Jurors, and others.

And truly, it is much with us in this Age, as it was in thoſe daies when Appeals were in uſe, and had the preheminence of the Kings ſuit; Never more killing of men by Duels, Tavern, and Game-

Game-house Quarrels, and yet never more impunity to such Mankillers, such valiant murtherers of their fellow Christians, especially if the Mankiller have either a fame for Honour or Valour, Mony, or Interest of Friends, to procure pity, or pardon and compassion from the Grand Jury, to find it Manslaughter (if they will go so high) where it is Murther, and then (through that false glass) to represent it to a most Merciful King, and thereby obtain a Pardon for the whole offence; or else, upon his Arraignment shall confess the Manslaughter, and procure a respect of his burning in the hand (because a Gent-hand killed the man) and afterwards procure a Pardon for that burning in the Hand, which the King may grant, it being no part of the Judgment, but a notifying the Person, that by that Mark he may be known again, once to have had his Clergy, that he may not have it a second time.

Many

Many Recent, and freſh Inſtances (in particular Caſes of blood) might be given (were it ſafe or ſeaſonable to make reflections) of divers Murthers, that have too eaſily ſlipt through the hands of Juſtice, by the averſneſs, ignorance, or partiality of Grand Jurors in not obſerving the direction of the Judges in this particular of finding Bills Murther, inſtead of Manſlaughter, yea, and that many times upon directions given in Court, after open Evidence, which open Evidence to a Grand Jury (eſpecially in Caſes of blood) ought to be avoided as much as may be, in regard it doth too much lay open and betray the Kings Evidence, to ſtanders by, it may be Friends of the Priſoner, that may make too much uſe of it for the benefit of the Priſoner, and prejudice of truth; beſides, many Witneſſes, although upon their Oath) will not ſpeak ſo fully in Court before the Bill found, and happily in the preſence of

of the Party, or his Friends, as in a Grand Juries Chamber; more private besides, where it is beforehand known, what witness-pinching endeavours will be used to keep him off, or by some sinister way to be complied with to lessen or hinder his Testimony to the second Jury (if there be occasion) besides, the Kings Evidence (before Issue joyned betwixt the King and the Prisoner) is alwaies to be secret, only open to the Grand Jurors, who are alwaies styled, *Juratores pro domino Rege*, the Kings Jury, and are sworn to keep the Kings Counsel, their Felons, and their own: now the Witnesses for the King are said to be of the Kings Council, which would abate much of their Oath, if Evidence, and the Kings Informations (in Cases of Bloud) should be open and common.

And as you have heard, what great Inconveniences were in the use and abuse of Appeals in the Reign of King *Henry* the Seventh,

so

so indeed as many (if not more Instances of mischief and inconvenience might be given of Grand Jurors in this Age (the best things corrupted proving the worst) you may conceive what great complaints have formerly been made against Grand Jurors in Parliament in erring upon both hands, by taking too much liberty to themselves, and not observing the directions of the Court, that there was a necessity of making an Act of Parliament, in the 3 *H.* 8. (immediately after Appeals began to fall off) as you may read in that Act of Parliament made to reform them, and to reform the Sheriffs power in retorning them; the whole Authority of retorning Inquests (to take Indictments) being by force of the Statute of the 11 *H.* 4. in Sheriffs and Bayliffs of *Franchises*. It is observed by the Statute of the 3 of *H.* 8. that by reason of Bribing of Sheriffs, and their Bayliffs and Officers, many true and substantial

3 H. 8.

persons

persons were divers times wrongfully indicted of Murther, Felonies, and other Misdemeanours, to the utter loss of their Lives, Goods, and Lands. And sometimes also great Felonies and Murthers were concealed, and not presented by the Grand Jurors, partially returned by the Sheriffs or their Ministers; for the prevention whereof, it was established by the said Act of the 3 *H.* 8. That *all Pannels of Grand Jurors, put in by any Sheriff before any Justice of Goal-delivery, and Justices of Peace, one being of the* Quorum, *in the open Sessions to enquire for the King, shall be reformed, by putting to, and taking off the Names of the persons which so be impannelled by every Sheriff, at the discretion of the said Justices, before whom such Pannel shall be returned, and the Sheriff upon pain of twenty pound shall allow of such Pannel, so reformed and returned by the Justices, the one half to the King, the*

other to him that will sue for the same, and the Kings Pardon shall not be a bar to his part that so sues. So careful were the Law-makers to have faithful Jurors, that should neither accuse the Innocent, nor excuse the Nocent, and that especially (in Cases of Blood) should make no concealment.

And lest all this care and reformation of Grand Jurors should do no good, but that they should still espouse their own opinions, and make head against the Court, and wilfully conceal Offences they were charged to enquire of, there is a Statute yet in force, 3 *H.* 7. in which it is ordained, That *the Justices of Peace may (in their discretions) cause an Inquest to be Impannelled, to enquire of the concealments of other Inquests taken before them, of such matters and offences as are to be enquired and presented before Justices of Peace, whereof complaint shall be made. And if any conceal-*

3 H. 7. of concealment

concealment shall be found by any Inquest, within one year after the said concealment, every person of the said Inquest, that made such concealment, shall be amerced or fined at the discretion of such Justices of Peace, the said Amerciaments so assessed in plain Sessions. And these Amerciaments or Fines may be very high, according to the nature of the Concealment and quality of the person. This Statute only concerns and remedies Concealments by Grand Jurors, before Justices of the Peace, at the Sessions of the Peace, as conceiving Grand Jurors would be bolder there, and take more liberty in their Presentments than they durst before Justices of Assize, Oyer, and Terminer, or Goal-delivery; as also, that such Justices and Judges knew better how to deal with them, if they made any such concealments or misprision before them: For the Grand Jurors being immediate and subordinate Ministers and

Officers in, and to the Court, and answerable for their Duty there, as Coroners, Constables, and other Ministers of the Court, they may and must stand to the Judgment of the Court; and in case of any wilful contempt, misdemeanor, and concealment, may, without Indictment, (for how can they be indicted at the same time by themselves) be fined by the Court, as any other Officer and Minister of the Court.

And let Grand Jurors take heed, lest by their remissness and peevishness, they give not occasion to the making of the like Statute as was made in the 11. of *H.* 7. *c.* 3. upon the surmise in the Statute, *That whereas many great Offences, as Riots, unlawful Assemblies, Extortions, Maintenances, Imbraceries, and other Offences, could not be duly punished by the due Order of the Law, except it were first found and presented by the Verdict of Twelve men thereto duly sworn, which will*

11 H. 7. c. 3.

Empson & Dudley's act.

Presentment called a Verdict.

will not find, nor yet present the Truth (observe here what occasions Grand Jurors had then given through their neglect) It was therefore provided and enacted by this Statute, *That Justices of Assize, and Justices of Peace, upon Information for the King* (that is meerly upon the Testimony of Witnesses, without Indictment, or use of Grand Jurors) *should proceed to make out Process, Punish and Condemn Offenders by their Discretion, as if it were upon Indictments found by Grand Jurors.* Which Statute was a great Infringment of the Common Law, and the Liberty of the Subject of *England*, who ought not by *Magna Charta*, and the Law of this Land, to be proceeded against, or condemned in their Persons or Estates (in Criminals) but by Indictment first had and found against them by Grand Jurors. It is true, that Treasons, Murthers, and Felonies, and such Offences (for which life and member should

be loſt) are excepted out of this Act (although they ſtand upon the ſame Reaſons as the other Offences named in the Act). For by this Act and new Law, the Subject might loſe his Liberty, ſuffer Ranſom, Stigmatizing, Pillory, Impriſonment, loſs of Lands and Eſtate (things very near to Life and Member). And the Lord *Coke* tells us, *That* Empſon *and* Dudley (*two Judges* (*by reaſon of this Act*) *committed upon the Subjects inſufferable Oppreſſions:* and therefore this Statute was juſtly Repealed after the Deceaſe of *H.* 7. by the Statute of the 1. of *H.* 8. *c.* 6. *A good Caveat to Parliaments* (ſays the Lord *Coke*) *to leave all Cauſes to be meaſured by the Golden and ſtreight Metewand of the Law, and not to the uncertain and crooked Cord of Diſcretion.* And as good a Caveat it is to Grand Jurors in caſes of Blood, not ſo much to be led by the crooked Cord of Diſcretion, as the ſtreight Rule of the

the Law, and Directions of the learned Judges, who should best know the Law, and the truest measure thereof: For if the Rule be true (as indeed it is) *Quod nihil relictum est arbitrio judicis*) that nothing is left to the Will of the Judge, much less, *arbitrio furatorum*, to the will of Grand Jurors, they having been (through too much connivance) by an evil practice, corrupted herein. But *errores ad sua principia referre, est refellere*, To bring Errors to their beginning, is to see their last.

Now, haply Grand Jurors may conceive, and argue thus; *That to extenuate an Offence, is not to conceal it, if they find it not Murther, yet they find it in some degree of Manslaughter, &c. Besides, if the Kings Council will put into the Indictment the words* (Ex malitia præcogitata, &c.) *which only make it Murther, and which is matter of Fact, they must make it out to us, that there*

was malice, either from our own knowledge of it, or that it is clearly proved to us from words or deeds expreſs, by ſuch an act, that lies in proof, or we are not bound to find thoſe words, but muſt ſtrike them out of the Indictment, or find an Ignoramus: *Or if the Witneſſes themſelves ſhall inform us, that it was a ſudden falling out, or done by misfortune,* Se defendendo, *in his own defence, or to defend himſelf againſt one that would have robbed him, in his Houſe, or upon the Highway; or that he that did it was a Watchman, a Conſtable, or lawful Officer, or Keeper of a Park or Warren, and in doing his Duty; or that he that did it was a natural Fool, one not* Compos mentis, *a Mad-man, or a young Child that did it, and by his young and tender years not capable of malice, and ſo could not be guilty of Murther; or if there had been former fallings out and differences betwixt them, yet all was reconciled,*

ciled, and they good friends again, and this only a casual and sudden difference betwixt them upon a new occasion, and exceedingly provoked unto it by him that was slain, so that we cannot be satisfied to find it Murther in any of these cases, being upon our Oaths to make true Inquiry, and if we find not the malice (being matter of Fact) another Jury cannot try it. Besides, we have former practice of our side, other Grand Jurors have had, and taken the same Liberty, and why should not we? The Judges likewise in their Charges inform us of all the specifical differences in Manslaughter, which we conceive they intend we should take notice of, as it comes in proof before us, in our Inquiry. This, I conceive, is as much as Grand Jurors have said, or can alledge for themselves (where they are not positively partial, and go clearly against their Evidence) why they do not, or will not (for such is some

some of their Language) find it Murther in all Cases, as the Court directs, and as the Bill of Indictment is drawn and sent to them as the King's Declaration.

To satisfie these reasonings and mistakes (though sufficient hath been said already to satisfie a wise and sober Grand Jury-man, especially in a Case of Blood, which can never receive too strict an Inquisition by a Grand Jury, the first Inquisitors of it in Court) let them observe, that neither themselves, nor the party accused, can be prejudiced by what they shall so find, be it never so high; First, not themselves; they do but present a probable Accusation (no Conviction) against such a person that hath had his hands in Blood, hath kill'd a man, is *Vir sanguinis*: And here certainly it will be the best satisfaction to Conscience (and that is the best Friend we can satisfie) to have all the Circumstances of the Fact (as they are laid in the Indictment) to be more judicially

dicially and circumspectly examined, sifted, and tryed out, by another Jury, by a Learned Judge, in a publick Court, to the parties face, where the King's Witnesses, and the party himself, and his Witnesses, may be fully heard, and the whole matter fully tryed and debated, which cannot be done in a Grand Juries Chamber, but is altogether stifled and obstructed, if the Grand Jurors suffer it not to come to this Judicial Test and Tryal, but shall put out the words, *Ex malitia præcogitata*, or otherwise alter the King's Declaration and Indictment, which already hath had proceedings in it, and that in Court of Record, where it hath been advised by the Kings Council upon perusal of Informations and Examinations from Justices of Peace or Coroner, in that Case certified to the Court, and upon hearing the Prosecutor and his Witnesses, and so drawn and presented to the Court, Witnesses sworn to it, and Indorsed, *Jurat.*

in

in Curia, ſworn in Court, and ſo become ſomething more than an ordinary Declaration or Writing in Parchment, to be altered by any, without advice or direction of the Court; for if it might be ſo, the King's Council and their Advice (together with the Judges in ſuch Caſes) would ſignifie very little in drawing or adviſing any Indictment of Murther, if Grand Jurors in their Chamber may (from their own advice) alter it as they pleaſe, the Judges themſelves being as well concern'd, in Conſcience, to do right to the Priſoner and Party accuſed, as Grand Jurors can be. And alſo admit that the Witneſſes ſhall inform the Grand Jury that it was a paſſionate and ſudden falling out, or that it was done unawares, or in his own defence, it is but what they apprehend it to be; they can inform but what they ſaw, or heard, or believe; they are in the Affirmative only, and can prove but for that inſtant the Fact was done;

done; they dare not swear that there had been no falling out before: and as they cannot, or haply will not, prove an express malice, so neither can they swear that there was none at all, or not such a malice as the Law implies; neither can the Witnesses judge in all Cases, what is Manslaughter at Common Law, what upon the Statute, what *per Infortunium*, what *se Defendendo*, what is Justifiable, or what is Murther: neither indeed in all these Cases, can the Grand Jurors, nor is it convenient for them to judge of all the specifical differences, each Circumstance may so much alter a Case; and will they then, by their uncertain Judgments, in case of Murther, conclude and precloſe the Court, and determine the Law, that this Fact of Blood shall go no higher than they please to adjudge it; as in the case put of a Child that kills another, not the Grand Jury (who see not the Child) but the Court, and the

the other Jury shall inspect the Child, shall judge whether the Child could do such an Act, *felleo animo, ex malitia præcogitata*, and so be guilty of Malice and Murther; the Court, and not the Grand Jury, being to judge, *an malitia supplebit ætatem*, whether upon hearing him speak, he may be thought capable of malice (as some at more tender years are than others) so in the case of a Fool, or a Lunatick, a Dumb or Deaf person; so in the case of a Reconcilement after a falling out, and then a killing; can either Jurors or Witnesses, or any that hears but one side, state the case aright, or judge whether the Reconciliation were perfect or not, so as to take away all the seeds of malice, revenge, or discontent? And Mr. Justice *Stamford* sayes, *That those that are Dumb and Mute, and Infants, shall be discharged upon Arraignment.* Which shews that they are to be Indicted of Murther: But how shall they be

be Arraigned, when they cannot hear, or speak, and plead? I conceive by the Inspection and Judgment of the Court upon their Arraignment, I mean, upon the Indictment found by the Grand Jury; which plainly shews that the Judges (not the Grand Jurors) are Judges of the Law, and of what shall be Murther. So in the case of killing a Thief that attempts to Rob or commit Murther, (which is justifiable) this must judiciously and certainly appear so upon the Tryal, that the Court may judge whether there were an intention to Steal, or to commit Murther, or Rape; and not let such a Surmise only, *That there was no such intention*, lead the Grand Jury to acquit him, when haply there was such intention. And the Statute of the 24. of *H.* 8. saith, *That the Party so Indicted or Appeal'd of such Offence for killing a Thief, or one that intended to Murther (by Verdict so found and tryed) shall*

not

not lose or forfeit Lands or Goods, but shall be discharged as one acquit of Felony; and none can be acquit of Felony that is not tried for it; the doubt being before this Statute, Whether he should forfeit his Goods and Chattels as one that kill'd another by Chance-medley? So that there was no doubt but such a one was Indicted of Murther before this Act, as one that had kill'd another by Chance-medly must, and yet is to be Indicted; Chance-medly being Manslaughter at Common Law.

Sure in all these cases, and all other the like cases of Blood, it is most prudent and safe for every wise and conscientious Grand Jury-man (that is satisfied there is Blood spilt, and the life of a reasonable Creature unjustly taken away by such a person charged in the Indictment) rather to presume it probable, all other Circumstances may be true, as they are laid in the Indictment (so far as to make

make an Accusation against a guilty person) then that they are not, and so to leave it fairly to the Court to judge thereof, and themselves free from the imputation of Blood by concealment; and thereby put the whole matter, with all its circumstances, upon a most legal and impartial Tryal, many times that appearing upon Tryal that appeared not before.

And the reason why a Petit Jury, or Jury of Life and Death, may extenuate an Offence, and make it less than the Grand Jury, is because (hearing of both sides) they may inquire of Circumstances which a Grand Jury cannot. Besides as the (*k*) Lord *Coke* informs (that Oracle of the Law) *An Indictment is no part of the Tryal, but an Information or Declaration for the King; and the Evidence of Witnesses to a Grand Jury, is no part of the Tryal: For by Law the Tryal in that case is not by Witnesses, but*

(*k*) Coke 3. Inst. fol. 26. 1. Inst. Sect. 194. Fortescue c. 26. 72. Stamford l. 2. fol. 90.

by the Verdict of Twelve men, and so a manifest diversity between the Evidence to a Jury, and a Tryal by a Jury. If the Indictment were part of the Tryal, then ought he that is a Noble-man and Lord of Parliament, to be Indicted by his Peers, for the Tryal of him ought to be by his Peers; but the Indictment against a Peer of the Realm is always found by Freeholders, and not by Peers.

The French word *Enditer* signifies in Law, an Accusation found by an Inquest of Twelve, or more, upon their Oath; and the Accusation is called *Indictamentum.* And as the Appeal is ever the Suit of the party, so the Indictment is always the Suit of the King, and as it were his Declaration, as the Appeal is the Declaration of the party. Some derive it from the Greek word ἐνδεικνύειν, to accuse, and as properly may it be called *Indictamentum ab indidicando, quia aliquid notum facit dicendo,*

dicendo, he that Accuseth or Appealeth another man, or brings his Crime into question, *indictatus*, *quasi indicatus*; one that hath his cause shewed out in publick; (*deferre nomen alicujus*, *judicare*) to Indict, is to Accuse or Impeach. It signifies in our Common Law as much as *accusatio* in the Civil Law, though it have not the like effect: *Accusabilis*, i. e. *accusatione*, *aut reprehensione dignus*, one worthy of Reprehension. An Indictment being like the precious Stone of *India*, called *Indica*, which (as *Pliny* notes) in rubbing it breaketh forth into a purple sweat: So doth an Indictment of Murther; which though it seem white and pale in the Grand Jurors hands, afterwards by rubbing and pressing hard in Court, breaks out into a purple or bloody sweat (as my self have very often seen experienced, when Grand Jurors have many times made great scruple even to find the Indictment at

all) what comes from the Grand Jury is more properly called a Presentment. For the constant form and words in all Bills are, *Juratores pro Domino Rege super sacramentum suum præsentant*; observe, they are stiled *Juratores pro Domino Rege* only; nor can they be otherwise: for they are to hear none but the Kings Evidence, upon his own Declaration: And whoever is to advance (as the Grand Jurors are) but the Interest of one side, ought as rationally to be permitted, to raise and advance it to the highest pitch (that by any reasonable presumption it will bear) as the other side have liberty to extenuate it to the lowest degree and mean that art and cunning (which in these cases of Blood are seldom wanting) can bring it unto; the one being upon an Accusation against a criminous person, who hath had his hands in Blood, and is certainly guilty in truth of something in the crime he is accused of: The other only upon

upon his own excuse, who can never (upon the whole matter) excuse himself, *à toto*, from the whole Crime of Blood. If they are satisfied that it is an Offence against the King's Peace, his Crown and Dignity, and the life of another person; it is enough for them to present the whole matter to the Court, as the Court hath directed and advised the Bill to them: For every Bill of Indictment, that is formally and legally drawn up, is presumed to have been seen, advised, and directed (as before is said) by the Court and the King's Counsel, upon an Information of the Fact taken by them (*l*), (as for the substance of it, is meet and fit to be put into such formal and legal terms for the King) as it is by the Judges sent out of Court to the Grand Jurors; it being a common practice for the Judges (according to the matter of Fact) to direct upon what Statute and Law, and in what manner

(*l*) *The Judges did advise in drawing the Indictment against* Leak, 4 Jac. Coke 3. Inst. Tit. Treason, fol. 16.

ner and form the Indictment ſhall be drawn and ſent to the Grand Jury, that if they find only probable matter contained in it of accuſation in any kind, they may ſo preſent it to the Court, as their Preſentment or Accuſation; the word *Preſentment* coming from the Latin word *Præſentio*, to ſmell or ſcent before, *præſentire in poſterum*, to have a ſenſe of that which is to come: ſo if they have any ſenſe or ſmell of Blood in the Indictment, it is enough for them to leave it to a further queſt of what ſhall come after: the Grand Jurors being like the good Huntſman, that obſerving where the Hare hath lately prickt, or the Deer lately ſtruck, or hath dropped blood, lays in his Hounds, and leaves them to make the diſcovery: ſo indeed ſhould the Grand Jurors do the Jury of Life and Death, in Caſes of Blood, and that the Blood of their fellow Chriſtians. And thence likewiſe the Grand Jurors Preſentment is

called

called an *Inquisition*, and themselves *Inquisitors*, from the Latin word *Inquiro*, *inquirere*, *quod vulgo dicitur facere Informationem*, for every Inquisitor is as an Informer, a promoter of the Accusation to the Court, in the behalf of the King, that it may be more judicially enquired into and determined, which is much like a Citation of a person into the Ecclesiastical Courts for a publick fame, which is either fit to be enquired further into and punished, or the party purged or pronounced Innocent: or like the Masters of Requests to the King (Honourable persons) that view all Petitions and Complaints before they be presented to the King, and determine what are fit to be presented unto the King, and what are fit to be rejected.

A strong Suspicion, and the Fame of the Country may (in many cases) be Evidence sufficient for a Grand Jury to find a Bill; and here I will leave to the ob-

servation of Grand Jurors, what I find in Mr. Justice *Stamfords* Pleas of the Crown, and which he himself observeth out of *Bracton*, a very ancient and learned Lawyer, as *Bracton*'s order in Cases of Suspicion upon Indictments of Felons(*m*) *de secta Regum.* The words are these, *Nunc autem dicendum est de Indictamentis per famam Patriæ, quum præsumptionem inducunt, & cui standum est donec indictatus se à tali Suspicione purgaverit; ex fama quidem oritur suspicio, & ex fama & Suspicione oritur gravis præsumptio. Tamen probationem admittit in contrarium sive purgationem, Suspicio quidem multiplex esse potest, primo, si fama oritur apud bonos & graves. Item ex facto præcedenti oriatur suspicio cui etiam standum est donec probetur in contrarium, &c.* and so goes on, to let us know the several badges and marks of *Suspicion*, advising, that those that will

(*m*) Bracton's *Order in* le Suspicion ou Endictments del Felons, *lib.*3. *cap.*22. *paragr.* 1. *fol.* 143. Stamf. *fol.*97.

will take Publick fame for an Evidence, take it from those that are of good Fame, and not of evil persons; as he goes on, *Non de malevolis & maledicis, sed providis & fide dignis personis, non semel sed sæpius, quia clamor innuit, & defamatio manifestat; Tumultus enim & clamor populi, quandoque fiunt de multis quæ super veritatem non fundantur. Ideo vanæ voces populi non sunt audiendæ, ut ne dicatur Jesus crucifigitur*, Barabas *autem liberatur.* The whole Chapter is well worth the reading.

And it may not be amiss to observe, that the ancient forms of Indictments or Bills began thus, *Inquiratur pro domino Rege, Let it be enquired of for our Soveraign Lord the King*, as the offence is laid in the Indictment, whether the offence be so (as is there supposed) which is as much as if the Grand Jury should say, *We judge it fit that it be farther enquired of, whether it be truly*

so

ſo indeed, as it is here ſuppoſed; for the Offence, as it is laid in the Indictment, as it comes from the Grand Jury (before it receive a farther trial and enquiry of another Jury) is no more but *Crimen ſuppoſitum & impoſitum*, an offence ſuppoſed and laid to ones charge to anſwer; and this clearly appears by the Record of every Acquittal or Conviction of any that is tried upon an Indictment; for the words of the Acquittal or Conviction (as they are drawn up in the Record) are theſe, *viz. Juratores* (that is to ſay, the Jury of Life and Death) *dicunt ſuper Sacramentum ſuum, quod prædictus* A.B. *non eſt* (*vel eſt*) *Culpabilis de Felonia & Murdro prædict. in Indictamento præd. ſpecificat. ei ſuperius imponit. modo & forma prout per Indictamentum præd. ſuperius verſus eum ſupponitur:* ſo that *ſupponitur & imponitur*, ſuppoſed and impoſed, is all that can be inferr'd from the Indictment; the Grand Juries Pre-

Presentment (upon hearing of one side) being the *Suppositio*, and the other Jury (upon hearing of both sides) the *Impositio*; or *Supponitur*, and that relates to the *substance* of the Indictment, as the Grand Jury suppose it to be; the *Imponitur*, and that relates to the *modo & forma* of the Offence, and the circumstances of it, as it is laid in the Indictment, as it is found by the Jury of Life and Death; and these Circumstances indeed are the proper enquiry of the Jury of Life and Death, upon the hearing of Evidence on both sides, as appears clearly by the penning and drawing up of these Records, and all this is no more than in every common Declaration at the suit of the Party, only this Indictment is as a Declaration upon Oath, and must therefore (for the satisfaction of those that are sworn) contain, that which for substance seems to them (*prima facie*) to be a probable truth, and a transgression of a Law,

Law, not ſtrictly looking into the matter and form, aggravations and circumſtances of the Fact (as it is laid in the Indictment) for thoſe do but attend and uſher in the Fact; but Grand Jurors are principally to eye and look upon the ſingle Fact and act it ſelf, and finding one that hath had his hands in blood, and that probably (upon a farther Enquiry) may become, *reus*, a guilty perſon, by killing of another perſon, they are to put their *Billa vera* unto it, although they have no proof at all of the Aggravations and Circumſtances that attend the Fact (Evidence many times ariſing out of the parties own mouth (againſt himſelf, upon a ſtrict examination in Court) more than the Witneſſes againſt him have proved.) And it is well obſerved in the Book called, *The Terms of the Law*, upon theſe two words, *Billa vera*, where it is ſaid, that *Billa vera* is the Indorſment of the Grand Jury upon any Preſentment

or

or Indictment, which they find to be probably true, (mark these words) *probably true*; nor do I take the Adjective *Vera* in this place to signifie *True*, but *meet*, *reason*, or *fit*, and so it is often used in *Terence*, and by the Grammarians, *Verum est*, *it is fit*: so that *Billa vera* upon the Bill doth not signifie, a *true Bill*, that hath nothing but truth in it, but a *meet*, or *fit Bill* for the further enquiry of another Jury, which ever succeeds such an Indorsment of *Billa vera* by a Grand Jury; certainly it is upon a great mistake (although I confess it is often used in Law-Books, and by wise men) to call the Presentment of a Grand Jury a Verdict, to say that their Indorsing *Billa vera*, or *Ignoramus* (which is all they do) is their *Verdict*, there being a great difference between *Billa vera* and *Veredictum*, which signifies *dictum veritatis*, and even induceth a Conviction; for nothing can properly be called a Verdict, but

where

where it is given by a Jury; after an Iſſue joyned, upon hearing of both ſides, *Veredictum*, is, as it were, *quoddam Evangelium*, like a little Goſpel of Truth, for indeed every Verdict (which convicts a man to the loſs of Life or Eſtate) ought to be as true as the Goſpel the Jurors ſwear upon; for upon the Iſſue of a Verdict, the Lives and Eſtates of all perſons depend: And therefore an Attaint lies in Law againſt thoſe Jurors that give a falſe Verdict, contrary to the truth of their Evidence, which is a Villainous Judgment, a very great Judgment in Law. And this Attaint did never by Law, lie, or was brought againſt Grand Jurors for any falſe Preſentment, for they do but barely preſent an offence, upon hearing of one ſide, and therefore can be no Verdict (as from them) the Grand Jury being for number indefinite, that being properly called a Verdict from ſuch a Jury, where the Law makes a determinate number of *twelve*,

twelve, or *twenty four*, and no more: Besides, it is alwaies said in the *Record*, where such a Jury finds a Verdict, *Juratores super Sacramentum suum dicunt*, &c. But where the Grand Jury present, *Juratores super Sacramentum suum præsentant* (not *dicunt*) there being as much difference between *præsentant* and *dicunt*, as betwixt a known truth, and the report and fame of a fact done.

And this will the better appear, if it be well observed what Grand Jurors write or Indorse upon the back of those Bills they find; for though they Indorse such Bills (*Billa vera*) yet they never Indorse upon those Bills they do not find (*Billa falsa*) as if one were true, and the other false, for should they do so, it would be like an Accusation against the Prosecutor that prefers the Bill, and a great discouragement to the Kings Evidence; but they modestly write (*Ignoramus*) which signifies to the Court, *they are ignorant*

rant of the matter in the Bill, and that they find no cause, either from what they have heard from the Witnesses, or know of their own knowledge, to commend it to a farther Enquiry: the Verb *Ignoro*, coming from *Ignarus, not to know, to be ignorant.* And this doth further evince, that the Grand Jurors *Presentment* cannot properly be called a *Verdict*; because a *Verdict* doth in Law either *convict* or *acquit*; which neither their *Billa vera*, nor *Ignoramus* doth; the first is always put to a farther enquiry, the last is no acquittal to the party; for although there be many *Ignoramus*'s against any person, yet may more Bills be preferred against the same person for the same offence; for it may be they did not find the Bill, in regard some Witnesses were absent or corrupted, or the matter in the Bill mistaken; happily it may be no Felony, but something done in jest, or in the nature of a Trespass, or a Natural death instead of a Murther, or the

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Witnesses of no Credit, or the like. But if there be any thing of Truth in the Bill proved to them to make a Crime, although not so fully as is laid in the Bill, they must not in such case write (*Ignoramus*) as if they knew nothing of a Crime; as if it be a Murther in the Bill, and the Proof reacheth but to an *Infortunium*, or *se defendendo*, or to any degree of unlawful killing; they must not write *Ignoramus* upon the Bill; or if Burglary, and the Proof makes it but a single Felony, and no Burglary; they must not Indorse it (*Ignoramus*) but in all such cases, where they are in any doubt, the best way for them will be to advise with the Learned Judge, to move the Court for directions therein. It is too great a Scandal to a Grand Jury (Persons in that quality highly to be esteemed) to say, that their *Ignoramus* (that is, their *Ignorance*) is

their Verdict. It is very safe for Grand Jurors, before they find an *Ignoramus*, to examine every Witness produced; but if they have many Witnesses in Murder or Felony, if any one Witness induce a strong and pregnant Presumption it is enough, without perplexing themselves, in hast of business, they need not examine any more, but put *Billa vera* unto it.

If a Grand Jury find, upon an Indictment of Murther, that *A.* killed *B.* what is it to them (as hath been said before) whether it be Murther or Manslaughter, whether it were done, *Ex malitia præcogitata*, *per Infortunium*, *se defendendo*, *in loco & tempore belli*, or otherwise, this is Special matter, and Special matter ought to be found when it is at Issue by another Jury, and must arise (I mean the truth of it) *super totam materiam* of the Evidence, or proof on both sides; which can never be found and determined by a Grand Jury, that hear but one side,

side, for very seldom is matter of Fact truly stated in a matter of difficulty, by one side, and therefore (as before is said) the Statute of *Glouceſter* provides, that every Man-slaughter, *per Infortunium* or *ſe defendendo*, ſhall be found *per Patriam* after the Priſoner hath joyned Iſſue with the King, and put himſelf *de bono & malo*, of good or evil, that is, either for his Acquittal or Conviction, *ſuper Patriam*; to be tried by his Country.

And the Jurors of Life and Death themſelves are not tied, as not ſtrictly to the form of an Indictment, ſo not to the whole matter of it; not to the form, as it was well urged by Sergeant *Montague* Reader at the Arraignment of the Earl of *Somerſet*, for Murther, by poyſoning of Sr. *Thomas Overbury* in the *Tower*, who told the Jury, That *they muſt not expect viſible Proofs in a work of darkneſs; that many things were laid in an Indictment only for*

form; that they must not look that the proof should follow that, but only that which is substantial, and the substance (in that Case) must be this, Whether my Lord of Somerset *procured, or caused the poysoning of Sr.* Thomas Overbury, *or not.* The Lord *Coke* (then Chief Justice) and other Judges present at the Trial, stood up and said, *The Law is clear in this point, that the Proofs must follow the Substance, not the Form, that the Law gives forms in Indictments, but substance in proofs.* And yet this was spoken to a Jury of Life and Death, who are more carefully to look into Circumstances and Forms (because their error is incurable, if they Convict a man to lose his life wrongfully) than Grand Jurors are. And I cannot but further observe (in this Case of Sr. *Thomas Overbury*) that which I would have all Grand Jurors, and Jurors of Life and Death, observe, as an Instance to guide them in other Cases of like

like nature, that although it was laid in the Indictment, That *the ninth of* May, *Anno* 11 Jac. *Regis*, Richard Weston (*who was procured by the Earl of* Somerset) *gave to the said Sr.* Thomas Overbury *a poyson of green and yellow colour, called* Rosacre, *in Broth; and the first of* June, *Anno* 11 Jac. *Regis* supradict. *gave him another poyson, called* white Arsenick, *and that the tenth of* June *Anno* 11. supradict. *gave to him a poyson called* Mercury, *sublimate in Tarts, and the fourteenth day of* September, *Anno* 11. supradict. *gave him a Glister mixt with poyson called* Mercury sublimate; (*Ut prædict.* Thomam Overbury *magis celeriter interficeret, & murdraret.*) *Et prædictus* Thomas Overbury *de separalibus venenis prædictis, & operationibus inde à prædictis separalibus temporibus, &c. graviter languebat, usque ad* 15. *diem* Decembris *Anno* 11. *supradict. quo die dict.* Thomas *de prædict. separalibus venenis obiit*

venenatus, &c. And albeit it did not appear, or could appear, of which of the said poysons he died, yet it was Resolved by all the Judges of the Kings Bench, that the Indictment was good; for the substance of the Indictment was, *whether he was poysoned, or not*; and it appeared that *Weston* within that time aforesaid, had given unto Sr. *Thomas Overbury* divers other poysons, as namely the powder of *Diamonds*, *Cantharides*, *Lapis Causticus*, and powder of *Spiders* and *Aquafortis* in a Glyster. And it was resolved by all the said Judges, that albeit all the said poysons were not contained in the Indictment, yet the Evidence of giving them was sufficient to maintain the Indictment, for the substance of the Indictment was (as before is said) *Whether he were poysoned, or not.* And when the cause of the Murther is laid in the Indictment to be *poyson*, no Evidence can be given of another cause, because they be distinct

ſtinct and other cauſes: So if the Murther be laid by one kind of Weapon, as by a Sword, Dagger, Stilletto, Stick, Tobacco-pipe, Knife, Sheers, or other like Weapon, it makes no difference, the Evidence will be ſufficient, if the party be ſlain by any of theſe, becauſe they are all under one Claſſis or cauſe.

v. Mackally's *Caſe, li. 9. fo. 67.*

And afterwards, *Anne Turner*, Sr. *Gervaſe Elwys*, and *Richard Francklyn* a Phyſician (Purveyor of the Poyſons) were Indicted as Acceſſaries before the fact done: And it was Reſolved by all the ſaid Judges, that either the proofs of the poyſon contained in the Indictment, or of any other poyſon (although it were out of the Indictment) were ſufficient to prove them Acceſſaries; for the ſubſtance of the Indictment againſt them as Acceſſaries, was, *Whether they did procure* Weſton *to poyſon Sr.* Thomas Overbury, *or no*? So that it may be obſerved here, what in the Caſe above was

observed by the Lo. *Coke*, that *Jurors were not to expect a direct and precise Proof in every point laid in the Indictment*; shewing, how impossible it were to Convict a Poysoner, who useth not to take any Witnesses to the composing of his slibber-sawces; neither do other Murtherers, to the contriving of their malice, and manner of killing another, but keep the fire burning in their own bosoms until it break out.

Nor in all Cases of *Murther* is it material, that expres Malice be proved to the Jury of Life and Death, though they be to Convict the Prisoner, much less (or not at all) is it material to prove it to the Grand Jury, who are but to present it, not to the Jury of Life and death in any case where the Law only implies it, for such proof is in the Judgment of the Court and not in the Jury, which the Jury must submit unto and be over-ruled in; much less is this implied Malice to be proved to the

Grand

Grand Jury, for it lies not in the proof of Witnesses, but in the construction of the Law (as is said before;) and yet the Grand Jury must find those words, *Ex malitia præcogitata, &c.* as if they were proved expresly unto them by Witnesses, or otherwise the Jurors of Life and Death cannot enquire of the offence (as (*n*) *Murther:*) And the Jury of Life and Death (in such a Case) must find those words expresly, although they cannot be proved unto them, but are only implied and supplied by Law, or else the party accused can never be Convicted of Murther, as might be instanced in very many cases, take some for all (*viz.*) One in prison kills his Keeper, and makes an escape, where no malice or falling out can be proved; a stranger, or other person kills a Watchman, Constable,

(*n*) Murther *is a wilful killing of a man upon malice, forethought (but this must either be expressed in proof, or implied by Law) it seemeth to come of the* Saxon *word*, Mordren, *which so signifieth; and* Mordridus *is*, the Murtherer, *even to this day amongst them in* Saxony, *from whence we have most of our words: Or it may be derived of* Mort est dire, *as* Mors dira, *Terms of the Law, title* Murther, *fol.* 207.

ble, or other Officer, that hath good warrant to ſtay him, though happily there be no cauſe for his ſtay, being an Innocent perſon, or another perſon, and not the ſame they intended; heres no Malice, yet this is Murther *ex malitia præcogitata*, &c. One goes into the Street, or High-way, and kills the firſt man he meets, although he did never ſee him before; The Father or Mother takes their ſucking Child, and daſheth out the Brains of it againſt the wall; Two perſons are fighting a Duel together upon cool blood, upon premeditate malice, and a third perſon comes to part them, and is killed by one of them, this is Murther *ex malitia præcogitata*, in him that killed him (if not in both) although neither of them ever ſaw him before, and yet no malice to this man: (o) One wilfully kicks or wounds a Woman great

(o) *Si ſit aliquis qui mulierem pregnantem percuſſerit ſi puerperium non formatum, vel animatum fuerit & maximè ſi animatum, fecit homicid.* Stamf. *fol.*12. In this fol. you ſhall find Juſtice *Stamford* uſing the words *homicid. & murdrum*, as ſignifying the ſame. v. *Stamf.* fol.21.c.13.

great with Child, whereby the Child is wounded in her, she is afterwards safely delivered of the Child (the Child alive) the wound or bruise by the kick or blow appearing upon the Child mortally, whereof afterwards it dies, this is Murther *ex malit. præcog.* and yet what malice had this man to the Child he never did see? Divers persons are unlawfully hunting in a Park, one of them kills the Keeper (after the Keeper had duly, according to his Office, admonished him to stand) all the rest of the Company (although a mile off in the said Park, and out of sight) are guilty of wilful Murther of the Keeper, and yet nothing of malice can be expresly proved. One is shooting at a Cock or a Hen, and kills another person, this is Murther, his act was unlawful. One finding a Gun or Pistol charged, lying upon a Table, or other place, takes it up into his hands, draws up the Cock (not thinking it to be charged) and in a jesting way gives fire at one in the

the Room, the Gun goes off and kills him; this is Murther, he had nothing to do to meddle with the Gun, it was out of his Calling, and none of his, he must Jest at his peril. A Drunken-man gets upon a Horse (which a sober person might ride quietly) and in a Fair or Market occasions the Horse to run over another person, and kills him; this is Murther. *A* gives *B* the lie, with many other provoking words, as Coward, Thief, Murtherer, whereupon *B* strikes *A*, and kills him; this is Murther *ex malitia*, &c. words are not a sufficient provocation for one man to kill another. If one killeth another without any provocation (actual) of the part of him that is slain; this is Murther, the Law implieth Malice. If a man knowing that many People are coming along the Street from a Sermon, throw a Stone over a wall or house, intending only thereby to fear them, and thereupon one is killed with the Stone; this is Murther, although

Coke li. 9. fo. 67. 6. in *Mackaly's* Case.

3. *Inst.* fol. 57.

though he knew not the party slain. If *A* assault *B* to rob him, and in resisting *A* killeth *B*; this is Murther by malice implied, although he never knew him.

If one meaning to steal a Deer in a Park, shooteth at the Deer, and by glance of the Arrow killeth a Boy that is hidden in a Bush; this is Murther, the Act being unlawful, though here was no intent to hurt the Boy, knowing nothing of his being there. *3 Inst. fol. 56.*

If a Woman being quick with Child, do wilfully with a potion, or otherwise, intend the destruction of the Child in her womb, the Child being born alive, dieth of the potion, battery, or other cause; this is Murther. *22 Ed. 3. Coron. 263.*

If one keep a Mastiff-dog, that is used to bite people, near the Common Highway, or a Bull or Beast, that hath hurt any one (after notice) they kill any one, it will be Murther in the Owner, although not present when the fact was done; and yet in this, and the

the other precedent Cases, here is no express Malice to be proved, but what the Law construes to be so, which can in no sense be left to the (p) Grand Jury to be judge of. But in all these Cases, and many more, must be ruled and over-ruled by the Judgment of the Court, in point of Law.

(p) *Murther is interpretative in the Law, and not to be left to Grand Jurors opinions.*

Although no Malice in these Cases can be proved to the Grand Jury or petit Jury, (q) yet the Indictment must be expresly drawn, and so found by the Grand Jury, with these words to make it Murther, *Ex malitia sua præcogitata, &c.* that is, that he killed him out of his malice, fore-thought; not that these words make a new offence of Felony and Murther, that was not Felony and Murther before, and so esteemed in all Cases where it was done voluntarily and by assault; and this appears plainly by the Statute of *Marlebridge* (formerly mentioned) 35 *H.* 3. where-

(q) *Aliquando vero clanculum & nemine videnti, ita ut sciri non possit quid sit actum, hujusmodi homicidium dici poterit Murdrum.* Stamf. 6. 1. fol. 12. Hales & Petty Case *in his Comment.*

where it is ſaid, *Murther from henceforth ſhall not be adjudged, before our Juſtices, where it is found by Misfortune only, but it ſhall take place in ſuch as are ſlain by Felony, and not otherwiſe.* By this Statute it is plain, that killing one unawares, by misfortune, was Murther before this Statute, and that after this Statute, all other killing, where it is Felony, ſhall be Murther, as before this Statute, *Felony* is a general term, which comprehendeth divers hainous offences, for which the Offender ought to ſuffer death, and loſe their Goods and Lands. They are called *Felonies* of the Latin word *Fel*, which is in Engliſh *Gall*, in French *Feil*, or of the ancient Engliſh word *Fell* or *Fierce*, or becauſe they are intended to be done with a cruel, bitter, fell, fierce or miſchievous mind.

Terms of the Law, Felony 160. *fol.*

So the Statute *de Officio Coronatoris*, made 4 *Ed.* 1. (where the Coroner is well directed his duty) where any perſon is ſlain, or ſuddenly

4 Ed. 1.

denly dead, how he ſhould behave himſelf, which is worth his reading. It follows in the ſaid Act in theſe words, *And if any be found Culpable of the* Murther, *the Coroner ſhall immediately go to his houſe, and Inventory his Goods, Chattels, Lands, &c.* (as in that Act is further directed) I only mention it to ſhew, that all that were found ſo ſlain, the Coroner was to enquire of it, as Murther, or otherwiſe there could be no Inventorying of Goods, valuing, or ſeizing of Lands, &c. or committing the Offender to the Goal by the Coroner, as plainly doth appear by that Act.

2 Ed. 6. c. 24. So the Statute of the ſecond of *Ed.* 6. where one is ſtricken in one County, and dies in another (it being doubtful before where the Trial ſhould be) gives power to the party concerned, to bring an Appeal (who had not power to Appeal in that caſe before) of Murther only in the County where the party dies, and in that caſe

case can bring no Appeal of Manslaughter (as in the streightned sense some would take the word Manslaughter) by this Statute is declared, That *where any* Murther *or Felony* (which word *Felony* here cannot comprehend *Manslaughter*) *shall be committed in one County, and there be Accessaries to the same in another County, upon an Indictment found in the County where such Accessaries are guilty, the Certificate of the Conviction or attainder of the Principal shall be good, to proceed against such Accessaries:* So that if the Principal be not Indicted of Murther, I conceive it is doubtful upon this Statute, to proceed to the Condemnation and Judgment of the Accessary in another County, for by no congruity can the words *or Felony* comprehend *Manslaughter*. A Pardon of all Felonies will hardly pardon Manslaughter, or be allowed of.

4 H. 7. c. 13. So in the 4th of *H. 7. cap.* 13. there are these words in the Statute; *Whereas upon trust of the priviledge of the Church, divers persons have been the more bold to commit Murther, &c. because they have been continually admitted to the benefit of the Clergy as oft as they offended; It is enacted, That every one being once admitted to have the benefit of his (r) Clergy (if not within Holy Orders) shall not a second time be admitted for such an offence. And that every person so Convicted for Murther, to be marked with an* M *upon the brawn of the left Thumb, and for another Felony with a* T.

(r) When Clergy began appears not by any Common Law book, it takes its root from a Constitution of the Pope, that the Priests should not be accused before a Secular Judge.

Co. Magna Charta 636. *It hath been confirmed by divers Parliaments, and so favourably used by the temporal Judges, that it hath been allowed to all Lay-men that could read, which is more than the Common Law requires.* Stamford *fol.* 123. *The first that mentions this Priviledge at Common Law is* Bracton, *that wrote in the time of King* Henry *the Third.* Bracton *lib.* 3. *fol.* 123. *The next is the Statute of* Westm. 3 Ed. 1. c. 2. *By the Popes Constitutions the Priviledge of* Clergy *extended to all Offences whatsoever; and the Prelates of* England, *by Colour thereof, did claim the same as generally.* vide 9 Ed. 2. Articuli Cleri. *Yet within this Kingdom Clergy was allowed only in Cases of* Murther, petty Treason, *and* Felony, *not in* Treason *against the King himself.*

Here

Here it is plain that the word *Murther* comprehended all manner of Manslaughter, all manner of Felonious killing, every Murther being Manslaughter, and every Manslaughter then as Murther, they being *Termini convertibiles*, equally signifying the Genus of Man-killing, you may perceive by what hath been said before, that *Felony* cannot comprehend *Manslaughter* or *Murther*, for here the one is to be burnt with an *M* for Murther, the Felon with a *T* for Theft, both which marks, upon the respective Convictions, are (as I conceive in those Cases) by vertue of this Statute, observed to this day, although we now apply the Letter *M* to such, as the Jury of Life and Death, upon an Indictment of Murther from the Grand Jury, shall Convict of *Manslaughter*, that is, upon the point shall find this Special matter, that is to say, that there was no Malice, expresse or implied, in him that killed the other; but in

a ſudden heat of blood, occaſioned by an actual (not verbal) provocation in him that was killed. This contradiſtinction betwixt the two words, *Murther* and *Manſlaughter* (as I conceive) came into our Laws only ſince the Statute of the 23 *H.*8. *c.*1. that takes away Clergy, that is, will not accept of them to be Clerks that kill another maliciouſly. I find not this diſtinction before, either in the *Levitical* Laws (the Laws of God) or the Laws of *England:* No Sanctuary or place of Refuge (as is ſaid before) by the Law of God, being allowed for ſuch a diſtinction, but both ſhould have been pluck't from the Horns of the Altar; and by our Law, in both caſes (notwithſtanding this Novel diſtinction) they were equally admitted to Clergies, I mean by the Common Law.

The ſaid Statute of the 4 *H.* 7. *c.* 13. being the firſt Statute (that I find) that appoints burning in the Hand for Murther and Felony, and

and takes away Clergy for the Second offence of the same kind, where Clergy hath been allowed before; and it is observable, that in this Statute it is called *Murther*, with, or without the words *Ex malitia præcogitata*, not having respect to our Modern distinction, which holds only (as is said) in the enquiry of the Jury of Life and Death, who have the whole matter of Fact before them, with all the circumstances thereof as it ariseth from both sides, which the Grand Jurors neither have, nor ought to have.

Then comes the Statute of the 23 *H.* 8. (formerly mentioned) being the first Statute that takes away *Clergy* for the first offence of Murther, called in this Statute *Wilful Murther* (*s*), of *Malice prepensed*; this Statute being made to rectifie the great abuse in Ordinaries, in suffering notorious *Thieves* and *Murtherers* to make purgation, 23 H.8. c.1.

(*s*) *That is, voluntary and of set purpose, though it be done upon a sudden occasion; for if it be voluntary, the Law implieth* Malice. Coke 3. *Inst. fol.*62.

and provides, That *no person which hereafter shall be found guilty (after the Laws of this Land) of any petit Treason, or for any Wilful Murther of Malice prepensed, Robbing of Churches, Robbing of Persons in their houses, or upon the High-way, wilful burning of Houses, or Barns with Corn, or Accessaries before the same, shall be from henceforth admitted to the benefit of their Clergy, but suffer death as if they had been no Clerks;* it seems all that were, that is, as many as the Ordinary then esteemed so, *Clerks*, although they were guilty of *Murther*, *petty Treason*, and *Felony*, suffered not death, (so great favour and immunity had they in those times for such bloody and crying sins) so prevalent were the Clergy, and those within Holy Orders, in those daies, that this very Act of Parliament, that takes away Clergy from others, that commit *Murther*, *Burglary*, and *Robbery*, and other Offences before-named, excepts

cepts all within Holy Orders (*t*), from the same pains and dangers other persons must suffer for the same Offences; which freedom and Indulgence continued to them in Holy Orders (as they call it) until the 28 *H.8.c.1.* which provides, That *they within Holy Orders, as to such and other Offences,* (*u*) *shall be under the same pains and dangers that others be.* Now this Statute makes none of the former offences Felony or Murther, that was not so before the making of this Statute, but only takes from them (that commit any of these offences) the benefit of their Clergy; certainly there wanted not those that committed wilful Murther of Malice prepensed (as we now distinguish it) before the making of this Statute; as those that committed Sacriledge, robbed persons in their Houses, and upon the High-way,

(*t*) *within five years of the time of King* Henry *the Second, there were above a* 100 *Murthers by Priests and men within Holy Orders.*

(*u*) *The Exemption of the Clergy taken away by the Laws of* Clarendon, Graft. 1187.

wilfully fired Houſes, and Barns with Corn, and were Abettors to the ſaid Offences: ſo it is very plain, that this Statute makes no alteration as to the drawing and penning of Indictments of *Murther*, *Sacriledge*, *Robbery*, *Burglary*, *&c.* but only takes away Clergy from every perſon, who after the making of that Statute ſhould be found guilty (as the words of the Act are, *after the Laws of this Land*) for any of the aforeſaid Offences. So that according as the Indictment of Murther was, by the Laws of this Land, before the making of this Act, ſo muſt it be after the making of this Act wilful Murther, in the Statute 32 *H.8. c.* 12. and this Statute of the 23. of the ſame King, comprehends as well that which we call *Manſlaughter*, and every killing where the will of man is freely engaged, as it doth wilful Murther of Malice prepenſed; compare them together, in the one you will find Clergy taken away

away for wilful Murther of malice prepensed, and Sanctuary from wilful Murther, and generally such Offences as were prohibited Sanctuary by former Statutes are now prohibited Clergy by later Statutes. The words *Ex malitia præcogitata, & murdravit* (which now make all this contest) before the making of this Statute in any case of Murther, neither aggravated nor extenuated the Offence, made it neither more nor less penal. But since the making of this Act, those words are made necessary in all Indictments and Convictions of Murther, and principally and only (in cases of wilful Murther) to be considered and weighed by the Court and Jury of Life and Death, upon hearing and debating the matter, with all its circumstances (as hath been said before) on both sides; those words being matter of Law, mixt with matter of Fact, and are not to be expunged by a Grand Jury, because they cannot afterwards be supply-

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ed nor implyed by the Court, and Jury of Life and Death after the Arraignment of the Prisoner, should there appear upon Tryal never so great cause, yet *Felonicè* and some other words (though material) may be supplyed in a Special Verdict. If upon an Indictment of Murther, *quod Felonicè percussit, &c.* the Jury find *percussit tantum*, yet the Verdict is good; for the Judges of the Court are to resolve upon the special matter, whether it was *Felonicè, &c.* or not? *Coke lib. 9. 69.* And if the Court adjudge it Murther, then the Jurors, in the conclusion of their Verdict, find him guilty of the Murther contained in the Indictment, and to shew the power of a Jury of Life and Death (who indeed should have the fullest and highest Charge can be laid against the prisoner, for the Offence he is to be tryed). If *A.* be Appealed or Indicted of Murther, *viz.* that he of malice prepensed kill'd *B.* *A* pleads that he

Cok. lib. 9. 69.

he is not guilty *modo & forma*, yet the Jury may find *A* guilty of Manslaughter, without malice prepensed; becauſe the killing of *A.* is the matter, and malice prepenſed is but a circumſtance, *Plow. Com.* 101. And generally where *modo & forma*, are not of the ſubſtance of the Iſſue, but words of form there, it ſufficeth, although the Verdict doth not find the preciſe Iſſue; 22 *H.* 8. *c.* 19.

Plow. Com. 101

22 H. 8. c. 19.

The firſt Statute that I find theſe words mentioned in of malice prepenſed, is the 22 *H.* 8. *c.* 14. where it is ſaid, *If any perſon, for any petty Treaſon, Murther, or Felony, have obtained the King's Pardon, or is otherwiſe diſcharged out of Sanctuary, and afterwards commit another petty Treaſon, Felony, or Manſlaughter by Chance-medly (and not Murther of malice prepenſed) and afterwards take Sanctuary again for any ſuch petty Treaſon, Felony, or Manſlaughter by Chance-medly, the ſame perſon ſhall enjoy a ſecond pri-*

22 H. 8. c. 14.

priviledge of Sanctuary: So that he that committed Murther of malice prepenſed, could not enjoy the benefit of Sanctuary a ſecond time.

Then comes the Statute of the
25 H. 8. c. 3. 25 *H.* 8. *c.* 3. and remedies divers defects that were in the ſaid Statute of the 23 *H.* 8. Foraſmuch as the ſaid Act extended only to ſuch perſons as were found guilty, after the due courſe of the Laws of this Land, divers and great Robbers, Murtherers, Burglars, and Felons, did commit thoſe Offences, perceiving, and clearly underſtanding (by the words of the ſaid Statute) that they ſhould not loſe the benefit of Clergy, unleſs they be found guilty, after the due courſe of the Law, upon their Arraignment of, and upon the ſaid Murthers and Felonies ſo by them done and committed, by reaſon whereof divers of the ſaid perſons, upon their Arraignment of the ſaid Offences and Felonies upon their Indictments againſt them, would ſtand

ſtand mute, and ſometimes challenge peremptorily over the number of Twenty, or elſe would not anſwer directly to the ſame Indictments whereupon they were Arraigned according to Law; It was therefore provided by this Statute, *That every perſon that hereafter ſhould be Indicted of petty Treaſon, wilful burning of Houſes, Murther, Robbery, or Burglary, or other Felony, according to the tenour or meaning of the ſaid Statute of the* 23 H. 8. *and thereupon Arraigned, and do ſtand mute of malice, or froward mind, or challenge peremptorily above the number of Twenty, or elſe will not, or do not anſwer directly to the ſame Indictment and Felony whereupon he is ſo Arraigned, ſhall loſe the benefit of Clergy, in like manner and form as if he had directly pleaded to the ſame petty Treaſon, Murther, Robbery, or other Felony whereupon he is ſo Arraigned, (not guilty) and thereupon had*

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been found guilty after the Laws of the Land. Upon the penning of this Act it seems clear that all Indictments for the unlawful or wilful killing of any person, ought to be made Murther as they were formerly before this Act. For if the Prisoner should be Arraigned upon an Indictment only of Manslaughter (according to the now distinction of Manslaughter) and upon his Arraignment should stand mute, not Answer directly, or challenge peremptorily, whereby he could have no Tryal, it would be a great question, Whether he could have Judgment upon this Act? The words are, *petty Treason*, *wilful burning of Houses*, *Murther*, *Robbery*, *Burglary*, *or other Felonies*; For as it is not named here by the term Manslaughter, so it cannot (with any congruity) be comprehended under any of those Heads: Not under the general Head of *other Felonies*, after the commemoration of so many several

Felonies

Felonies next before, as *Burning of Houses*, *Robbery*, *Burglary*, *and other Felonies*, must needs be intended of such like Felonies or Thefts. And what Judge (in case of Life and Death) will proceed upon such a *moot point* (or rather a clear Case to the contrary) to give Judgment and Sentence of Death upon any by this Act of Parliament.

Then comes the Statute made in the 28 *H.* 8. *c.* 1. and rehearseth all these former Statutes, *viz.* 22 *H.* 8. 23 *H.* 8. and the 25 *H.* 8. and continues them all until the next Parliament; and provides further, *That such as be within Holy Orders, shall be under the same pains and dangers that others be*; (all within Holy Orders being by the 23 *H.* 8. excepted in Cases of Murther, petty Treason, and Felony, from the pains and dangers that Lay persons suffered for such offences). It seems those in Holy Orders then began to lose their esteem, as appears more fully 28 H. 8. c. 1.

fully in the enſuing Act, which perpetuates the former Acts.

32 H.8.c.3. Then comes the Statute made in 32 *H.* 8.*c.*3. and rehearſeth the ſame Acts again, and makes them perpetual; and Enacts, *That all perſons within Holy Orders, which by the Laws of this Realm ought, or may have their Clergy for any Felonies, and ſhall be admitted to the ſame, ſhall be burnt in the hand, in like manner as Lay Clerks in ſuch Caſes, and ſhall ſuffer all ſuch pains, dangers, and forfeitures as Lay perſons in like Caſes.*

1 Ed.6.c.12. Then comes the Statute of the 1 *Ed.* 6. and after it hath declared what Acts ſhall be Treaſon; declares what Offences ſhall be outed of Clergy, *viz. Such perſons, as in due form of the Laws, ſhall be attainted or convicted of Murther of malice prepenſed, of poyſoning of malice prepenſed, of breaking of any Houſe by day or by night (any perſon being put in fear) robbing any perſon in or near*

near the High-way, felonious stealing of Horses, Geldings, or Mares, or for felonious taking of any Goods out of any Parish Church, or other Church or Chappel; all Offenders in any of these Cases shall be excluded of the benefit of Clergy, whether they be convicted by Verdict, Confession, or stand Mute, &c. and that in all other Cases of Felony, Clergy may be allowed. Here is no mention of petty Treason, burning of Houses and Barns with Corn, and Accessaries before, to be outed of Clergy, as is in the 23 *H.* 8. *c.* 1. So that it seems after the making of this Act, they might have had their Clergy; the new Offences added to this Act to be outed of Clergy (that were not in that Act of 23 *H.* 8. are only *stealing of Horses, Geldings, and Mares:* And by this Act *Poysoning* is made Murther, although no malice be proved, and Clergy taken away.

Poysoning murther, although no malice be proved.

2 Ed.6. c.24. Then comes the Statute of 2 *Ed.* 6. and this Statute gives remedy in several Cases of Murther and Felony (where there was none before at Common Law). As first, where one is feloniously stricken in one County, and dies thereof in another. Secondly, where one is Accessary in one County to a Murther, or Felony in another County; before this Statute, no sufficient Indictment in any of these Cases, could be taken in either of the said Counties; for that by the custome of the Realm, the Jurors of the County where such party died of such stroke, would take no knowledge of the said stroke (being matter of Fact) in a forreign County, although the said Counties and Places adjoyned very near together; nor the Jurors of the County where the stroke was given, could take knowledge of the death in another County, although such death most apparently came of such stroke; so that such

such Offence (and the other Offences before mentioned) for the like reason remained unpunished; and such Murther could not be proceeded against, either by way of Indictment or Appeal: Now this Statute provides, *That an Indictment found by the Jurors of the County where the death shall happen, whether it be found before the Coroner, upon sight of the dead Body, or other Justices that shall have power to inquire of such Offences, shall be as good and effectual in Law, as if the stroke and poysoning had been committed and done in the same County where the party shall dye, or where such Indictment shall be found.*

And likewise provides, *That such Party, to whom Appeal of Murther shall be given by the Law, may commence, take, and sue Appeal of Murther in the same County, where the same person so feloniously stricken or poysoned shall dye, as well against the*

Principals, as against every Accessary to the same Offences, in whatsoever County or Place the Accessary or Accessaries shall be guilty of the same. And doth further provide, *That where any Murther or Felony shall be done in one County, and another person, or more, shall be Accessary, or Accessaries, in any manner of wise to any such Murther or Felony in any other County, that then an Indictment found or taken against such Accessary, or Accessaries (upon the Circumstances of such matter before the Justices, &c.) where such Offence of Accessary shall be committed, shall be as good in Law, as if the principal Offence had been committed in the same County where the same Indictment against such Accessary shall be found.*

Cok. l. 9. f. 117.

Here it may be observed, That the Appeal given by this Statute to the party, where one is wounded or poysoned in one County, and dies thereof in another, must be

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an Appeal of Murther, otherwise it will not lye either against Principal or Accessary by the words of this Statute. So in case of an Indictment (where it is said in this Statute, *where any Murther or Felony shall be committed in one County, and the Accessary be in another County*) here the word Murther must be one *Species*, and Felony, that is Theft, another; *viz.* carrying of stoln Goods into another County: So that the Indictment in this case against the Principal must be Murther, or the Accessary thereto is not tryable in another County; and there must be a Certificate of such Conviction or Attainder of the Principal under the Seals of the Justices before whom such Principal was Convicted or Attainted, before such Accessary can be tryed; and that shall be sufficient to enable the Justices to try the Accessary in Murther or Felony in another County. And although the word *Manslaughter* be mentioned in this

Statute (as thus, *within the year and day after such Murther and Manslaughter committed*) it is not here mentioned, as any *Species* of Murther, but only as the *Genus* called in this place only Murther and Manslaughter.

5 Ed. 6. c. 9. Then comes the Statute of the 5 *Ed.* 6. and Resolves three several Doubts or Questions moved upon the Statute of the 23 *H.* 8. *c.* 1. The first Doubt was, *Whether Clergy were taken away by that Statute, unless the very Felony and Robbery were committed in the very Chamber or Place where the Owner, Dweller, his Children, or Servants should happen to be (although they were in some other part of the House).* The second Doubt was, *If it were done in the Chamber, and the parties there asleep, and so not put in fear.* The third Doubt was, *Where such Robberies or Felonies are committed in a Booth or Tent in any Fair or Market, the Owner, Children, or Servants being*

This is not much pertinent to this purpose, but that it takes away Clergy, and relates to several Statutes before mentioned concerning murther.

being then put in fear, whether Clergy should be taken away by that Statute in any of these Cases.

For the clearing of these three Doubts it was Enacted, *That if any person be convicted for robbing any in any part of their dwelling House, or dwelling Places (the Owner, his Children, or Servants being in any part of the said House or Precincts thereof) whether sleeping or waking, such Offender shall not be admitted to his Clergy. And so he that robs any Tent or Booth, in Fair or Market, whether the Owner, his Wife, Children, or Servants be sleeping or waking in the same, shall lose his Clergy.*

Then comes the Statute made in the 5. of *Ed.6.* and takes away Clergy from those, *That commit Burglary or Robbery in one County, and carry the Goods into another County, and are there legally convicted.* 5 Ed.6.

This Statute likewise declares

25 H. 8. c. 3. the Statute made the 25 *H.* 8. *c.* 3. ſhall ſtand in force, notwithſtanding a Clauſe compriſed in the Sta-
1 Ed. 6. c. 12. tute of the 1 *Ed.* 6. *c.* 12. which makes void a Clauſe in the ſaid Statute, and takes away the force of it in taking away Clergy from ſuch as commit Robberies and Burglaries in one County, and are convicted of the Felony for bringing the ſtoln Goods into another County. For whereas the ſaid Statute of the 1 *Ed.* 6. *c.* 12. declares, *That ſuch as are convicted or attainted of Murther of malice prepenſed, or of poyſoning of malice prepenſed, or of breaking any Houſes by day or by night, (any perſon there being put in fear) or robbing any perſon in or near the High-way, or for ſtealing Horſes, Geldings, or Mares, or Felonious taking any Goods out of any Pariſh Church, or other Church or Chappel, ſhould not have the benefit of Clergy. And that in all other Caſes of Felony (other than ſuch as before are*

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mentioned) *Clergy should be allowed in like manner as it might have been before the* 29 *day of April, in the first year of King* Henry *the Eighth, by reason of which Article or Clause the said Statute, made in the* 25 H. 8. *which did put such Felons and Burglarors from their Clergy, that do such Offence in one County, and after are taken with the Goods stoln in another County, and there Arraigned and found Guilty, was made void, to the great boldning and comfort of such Offenders: It is by this Act Enacted, That the said Act made in the said* 25*th year, touching the putting of such Offenders from their Clergy, and every Article, Clause, and Sentence contained in the same touching Clergy, shall from thenceforth* (*touching such Offences*) *stand and be in force.* Cokel. 11. f. 31.

Then the Statute of 2 & 3 of *P. & M. c.* 17. takes away the benefit of Clergy only from *Bennet Smith*, for being Accessary to the Murther Stat. 2 & 3 P. & M. c. 17.

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of *Giles Rufford* before the Murther committed, and for procuring of the same.

Stat. 4 & 5 P. & M. c. 4.

Afterwards the Statute of the 4 & 5 of *P. & M. c.* 4. takes away Clergy from every person, *That shall maliciously command, hire, or counsel any person or persons to commit any petty Treason, wilful Murther, Robbery in any dwelling House or Houses, Robbery in or near the High-way, or wilfully to burn any dwelling House, or any part thereof, or any Barn having Corn or Grain in the same.*

Dier f. 183, 186. Cok. l. 11. f. 35.

Here I had thought to have proceeded, and to have mentioned (in order of time) all such Statutes as were made in any King's Reign, to take away Clergy in any Case of Felony, but that would be too much to assume another Subject, than what principally is here intended, having made too great a digression already, yet not altogether unuseful herein.

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Then the Statute made 1 *Jac.* c. 8. takes away Clergy from him *that shall stab another, that hath not first stricken, nor hath a weapon drawn (if he dye thereof in six months, although no malice can be proved) except it be done* se Defendendo, *or by misfortune, in keeping the peace, or correcting his Servant or Child.* This without all question was Murther (by malice implyed) before the making of this Statute; and such a kind of killing is adjudged Murther at this day, that is, where one shall wilfully kill another (by any weapon) without provocation from him in deeds; for no provocation in words [only] will make it Manslaughter, or less than Murther. And (in my judgment) it is an Error in practice of this Indictment upon the Statute of Stabbing, to leave out the words (*ex malitia præcogitata*) in the Indictment: For the words of the Statute are (*although no malice can be proved*) then sure the meaning 1 Jac. c. 8.

meaning of the Statute is (as in other cases) it shall be implyed: And in all Indictments, where malice is only implyed, and cannot expresly be proved, those words *ex malitia, &c.* must be put into the Indictment, to make it Murther, and to take away Clergy, and by such words the Indictment will be good, both upon the Statute, and at Common Law.

And so are the Indictments made against lewd Women that kill their bastard children, upon the 21 *Jac. cap.* 27. although the special matter of the Statute be put into the Indictment, *viz. That it is a bastard Child, and born of her body alive*, yet the words, *ex malitia præcogitata*, are always put into the Indictment; which malice the Law implies, although none can prove the child born alive, and none can be presumed to bear malice to a dead child: And haply it might be born dead, or dye after it was born, against the will of the Mother,

21 Jac. c. 27.

Mother, of her Throwes and Strivings, to be delivered without help. It is not the burying of the Child, or hiding of it, that makes it Murther upon the Statute (as some have conceived) for if the Child be found dead in Bed by her side, or in her bosome, yet it is Murther; for the word [*conceal*] in the Statute, relates not to the Body of the Infant, but the death of it; the words being these, *Shall so conceal the death thereof, that it may not come to light* (that is, to the knowledge of one Witness at least) *whether it were born alive or not, but be concealed, she shall suffer death as in case of Murther:* If she can prove by one Witness it was born dead, then her hiding or burying it afterwards will not be Evidence against her to take away her Life upon that Statute.

These two Statutes create no new Offence that was not Felony and Murther before, but only take away Clergy in those two cases, the

1 Jac. c. 8.
21 Jac. c. 27.

the one of ſudden and deſperate ſtabbing (then frequently in uſe) the other of lewd Whores, who having committed one ſin, to avoid their ſhame, and the charge of a Baſtard, would commit a greater, by truſting to their own ſtrength in their Delivery, that they might more privately deſtroy the Infant, and yet avoid the danger of the Law, becauſe in that caſe, none for the King could prove the Child born alive, and therefore it was impoſſible to Indict and Convict her at the common Law for Murther, although really and in truth it were ſo. This Statute makes the Suppoſition good for the King to the Grand Jury, and Jury of Life and Death, and to the Judgment of the Judge in point of Law, that the Child (ſuppoſed to be murthered) was born (*x*) *alive*, and by her

(x) *Note this here, the Grand Jury find as it is laid in the Indictment by the Kings Counſel, that the Child was born alive, although they have not the leaſt Evidence for it, and yet I truſt they are not forſworn.*

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murthered, in regard she being a lewd woman, and contrary to the Custome of honest and innocent women (who always desire help in their Labour) chuseth to be delivered alone, this Statute puts the proof upon her (if she will avoid so strong a presumption of Murther) to be sure to have one Witness to prove the Child was born dead. It being likewise strongly presumed, that a woman (without help of some other) cannot be delivered of a Child at full growth dead in the Womb.

Two remarkable Cases I have known in my time upon the said Statute of 1 *Jac.* in *Oxfordshire* Circuit; the one in Mr. Justice *Jones* his time (a Learned Judge that went Sixteen years together that Circuit) where the Case was; A cunning desperate Fellow, having an intention to stab another person, and yet to avoid coming within the danger of that Statute, had (to that purpose) provided himself of a Dagger naked in his Pocket

Pocket (he being never known to wear any before) came into an Alehouse where the party was he intended to stab, and at first coming used very friendly Language unto him, but afterwards all the provoking Language he could, to make the other strike him; which the other no sooner held up his stick to have done, but he stabb'd him into the Body with his Dagger, whereof he dyed: No malice could be proved, yet so much of his intention by his preparation and circumstances appearing to design the stabbing of the other, that it was adjudged to be within the meaning, though not within the Letter of the Statute, the Lord Chief Baron *Davenport* being the other Judge of that Circuit) and he was denyed his Clergy, and after Judgment was Executed. It being then observed by the Judges, That immediately after the making of that Statute, many desperate Fellows (that could read as Clarks) to those

those they had a mind to quarrel withal) would use all means to make them strike first, and then suddenly stab them; and by this way avoid the said Statute, and become guilty only of a Manslaughter at Common Law, and so receive the benefit of Clergy, which the Statute takes away. The other Case was in the same Circuit, very lately, before Mr. Justice (*y*) *Windham*, at the Assizes at *Worcester*, a little before his death, Where a Father correcting his Son, for some undutifulness he conceived in him (having a Knife in his hand, being eating his dinner) struck his Son over the back with his knife, and gave him a stab whereof he died: The Judge apprehended this Offence to be within the Statute, notwithstanding that Exception in the Statute, of a Father correcting or chastising his Child or Servant, in regard it was an unreasonable way and means of correction: whereupon he reprieved the Father

(*y*) Sir *Wadham Windham*, Kt. one of the Justices of the Common Pleas.

ther for some short time, and advised with the rest of the Judges at *Serjeants Inn*, and after he had their Opinions that it was within the Statute, he forthwith sent down a Warrant to the Sheriff to do Execution, having received Judgment of Death at the Assizes; and yet the words of the said Act of Parliament are (*although his Son, or Servant, dye of such correction, he shall not be within the said Act*).

Observe here how necessary it is, That all the circumstances that can be in an offence of blood, be put into an Indictment, and be so found by the Grand Jury (as it is advised by the King's Counsel) where there is innocent blood shed by the party indicted, that every part and circumstance of the Fact, with all its aggravations, may come to be considered and weighed by the Court, which otherwise cannot be; as in this Case of the Father killing his Son, if the Indictment had not been drawn upon

on the Statute, but at Common Law, in regard of that Exception in the Statute (as the Grand Jury then would have had it) the party had been capable of Clergy, and so might have escaped that Judgment of Death. If such difficulties appear to the Learned Judges, upon due consideration of the Law, and of all circumstances in cases of blood, how much more will it prove difficult to Grand Jurors? and how little reason have they to expunge, alter, and obliterate circumstances of aggravation in such an Indictment, upon hearing only of one side, as they please, and so prevent the Judgment of the Court therein, taking from them the power, even to examine such a circumstance, as may (if truly stated and examined) rule the whole Case, as before is observed.

In all the Offences formerly mentioned, where Clergy is taken away by those Statutes, there is no new offence of Felony or Mur-

ther made, that was not so before the making of those Laws, as might be instanced in Murther, Robbery, Burglary, Sacriledge, Cutting of Purses, Stealing of Horses, Rape, and the like; but only Clergy taken away from the Offender (which is no more but the abusive bloody liberty of Clerks in those times restrained) as wilful Murther where malice appeared, and other mixt and simple Felonies, which were then most raging and reigning Offences in the Kingdom, and cryed out for a greater Remedy, a stricter Law to be made against them (as appears by the Preambles of those Statutes that take away Clergy in those Special Cases) that were Murther and Felony at the Common Law before; from whence I conclude, that the Forms of Indictments of Felony or (z) *Murther*, are no

(z) *The name of Murther was not changed, but the Law retains it continually for the heinousness of the Crime.* Stamford fol. 19. *If not the name, then not the words that make it so.*

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way directed to be altered by those Statutes that take away Clergy, but are to continue in the same form as they did before at the Common Law. And I am not of their Opinion, That the words (*ex malitia præcogitata*) came into Indictments immediately after the aforesaid Statute of 23 *H.* 8. Certainly there were Murthers committed, and that frequently, of malice fore-thought, before the making of that Statute, and those Murtherers had their Clergy also; otherwise that Statute had never been made to take it away. If the Grand Jurors shall say, *They will not find those words*, Ex malitia præcogitata, *put into the Indictment, except the malice be plainly proved to them*; then farewel that distinction and inference of implied malice, which the Law makes, in many Cases, and which otherwise cannot be made; they may as well say, *That they will not find such words Treason, that are Treasonable, because no* 23 H. 8.

Act of Parliament, or expreſs Caſe at Common Law, ſays thoſe particular words are Treaſon; or that they will find no Indictment of Burglary, although the Goods ſtoln be found with the Thief, and the dwelling Houſe broke, becauſe no Witneſs ſtood by to ſee the breaking of the Houſe, entring into it, and ſtealing thence the Goods: Or againſt a Cut-purſe, though the Purſe or Mony be found in his hand, or becauſe none ſee him take it forth of his Pocket; or to find the Indictment, becauſe it is laid to be done Vi & armis, *with force and arms, and yet ſaid to be done (in the ſame Indictment,* clam & ſecrete, & ſine notitia) *privily, ſecretly, and without notice of the party, which (in Fact) could not be done if it were done by force or arms: Or to find an Indictment of Robbery done upon the High-way, againſt thoſe that rob in Vizards, notwithſtanding the mony be owned, and found about them, becauſe*

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the party cannot swear he saw their faces, and that these were the men: Or that such a one kill'd a man, that comes out last from him with a bloody Sword in his hand, and no person besides with him. In all these Cases it is possible, the Parties accused might find the Goods stoln; and so might the bloody Sword be found, and another do the Fact; but sure here is great and violent presumption (sufficient for an Accusation) for a Grand Jury to find an Indictment (which is but an Accusation upon Record) to bring the Delinquent, or Party so strongly suspected, to a Judicial Trial; and as well may it be presumed, when one Christian is kill'd by another, it may be Murther, that there may be a seed of malice in the will of him that did it, by a voluntary and spontaneous motion in that act, that may (upon a greater Debate) contain some circumstance in it, that by some reason in Law (better known to the Learned Judge,

than the Grand Jurors) that may in Law prove malice expreſſed or implyed in the criminous Perſon.

And if it be ſo difficult in caſes of blood for Grand Jurors to determine what is Murther, and what is not, let them conſider how dangerous a thing it is for them to miſcarry in their Preſentment in caſes of blood, of innocent blood (as is before manifeſted) and ſo acquit the Murtherer, and take the imputation of blood-guiltineſs with them, from the Aſſizes to their reſpective Families, where it may and will cry againſt them and the whole Kingdom for vengeance: I do therefore ſubmit it to their ſerious conſideration, upon what hath been ſaid, Whether it be not much better, and a ſafer way for them, to ſubmit their Judgments herein to the Rule of Law, and the Reſolutions of the Learned Judges, than by their extenuating preſentment (for the Court can go no higher than they pre-

present) to stifle Justice in the birth, and to acquit a Murtherer: For the Indictment, although no part of the Trial, yet is the very Basis and Foundation of all the other Proceedings. And let them consider how strict (formerly) the very Law of *England* was in King *Edward* the Second's time in cases of blood, where the very will and intent to kill a man (although it was not executed) was punished for the Deed) although the party wounded recovered of his wounds.

A memorable Case there was in that King's Reign, cited by Justice *Stamford*, where one compassed the death of another, and did so grievously wound him, that he left him for dead, but afterwards the party recovered; this was then adjudged Murther, because his will appeared so plainly to have kill'd him. For, as *Bracton* says, *In maleficiis spectatur voluntas, & non exitus*, then was the Will by our Law (as it is yet be-

Stamf. fol. 17. Pl. Coron. Tit. Coron. Fitz. V. 15 Ed. 2. p. 383.

before God) reputed for the Deed: But now our Law couples the Will and the Act together in cases of blood; but looks more upon the Act than the Will: For though the Will do neither intend the Act (as it is done) nor approve of it (after it is done) yet if the Will in any part of the Act be criminous, it makes the Offender (in our Law) in cases of blood, guilty of the whole Fact, with all the obliquity and evil in it. As if a man intend only to beat another, to strike him, but not to kill him, and the party die of the stroke, it may be murther in him that gave the stroke. So if three men come to make a Disseisin, and one of the three kill a man, the other two persons are guilty, as principals in the murther, although they neither consent to it, will it, or strike the Party, nor came with that intent, but only were in company to have done another Act. So if one, to kill his Wife, give her (lying sick) Poyson in a roasted Apple,

Vid. Tit. Memorat. p.331, 350.

Hales & Petit Case le Com. 261. a.

18 El. Pl.474.

Apple, and she eating a little of it, give the rest to a little Child of theirs, which the Husband (lest he should be suspected) suffereth the Child to eat, who dieth of the same poyson, this is murther though the Wife recover; for the Poyson ministred upon malice prepensed to one, which by a contingency procureth the death of another whom he meant not to kill, nor bear any malice to, shall be as great an Offence as if it had taken the effect which he meant, proceeding from a naughty and malicious intent. So where two men combat together, upon the evil and provoking words of a woman, and the one killeth the other, the woman in this case was Arraigned of the death of him that was kill'd; and in this Case the Grand Jurors found it murther. So if an ignorant person take upon him to give Physick to one that is not well, and through his ignorance administreth that unto him that (apparently) kills him,

him, this is murther. And so it might be instanced in many similar Cases, which are not to be disputed by Grand Jurors, but presented by them *in re. forma*, as the Indictment is advised by the King's Council, and comes to their hands, where they find (as before is said) a criminous Party in the Indictment, and a Body (found) of a reasonable Creature, certainly, or probably kill'd by him, although the Evidence be not express to every circumstance of aggravation, as it is laid down in the Indictment, whereby to bring the Party and his Offence of Blood to a full Trial by a second Jury, which otherwise can never be done, neither the Law therein known from the Court in such a Case.

Besides, many other Inconveniences and doubts may arise where the Grand Jury find the Bill of Indictment only *Manslaughter*, which by finding of it *Murther* would be prevented, as in challenging

lenging upon his tryal above the number of twenty Jurors; the Statute of the 22 *H.*8. *c.*14. reduceth peremptory challenge upon an Indictment or Appeal, which at the Common Law was allowed to the Prisoner, to challenge thirty five Jurors (which is under the number of three Jurors;) this Statute so provides, That *a Prisoner shall not now in* Petit Treason, Murther *and* Felony, *challenge above twenty Jurors, without shewing cause:* And in case of Treason, and misprision of high Treason, it was taken away by the Statute of 33 *H.* 8. but now by the Statute of 1, & 2 *Phil.* & *Mar.* the Common Law is revived, *for any Treason the Prisoner shall have his challenge to the number of* 35; and so it was resolved by all the Justices upon conference between them in the Case of Sir *Walter Rawleigh* and *Geo. Brooks:* By this Statute it is plain, that if one be Indicted or Appealed for *Murther*, and challenge above the

22 H.8. c.14. *made perpetual by* 32 H.8.3. Brook *Challenge* 217.

33 H. 8.

1,2 Ph.& Mar.

Hil. Ja. R.

the number of twenty Jurors peremptorily (without shewing cause) it shall be a Conviction of the offence and Capital; but it is a great *quære*, whether he that is Indicted or Appealed only for Manslaughter (which is not named in this Act, nor can be rationally comprehended in the word *Felony* more than Murther might have been) may not challenge thirty five Jurors, as at Common Law? so it may be a *quære*, where the Prisoner Indicted only of Manslaughter, shall stand mute, or will not answer directly to the Indictment, whether notwithstanding he shall not have his Clergy? for the Statute of the 1 of *Ed.6.c.12.* and other Statutes that take away Clergy from such offences and Offenders (as are therein mentioned) take it away as well from such as stand mute, answer indirectly or challenge peremptorily above the number of twenty, as from those that are convicted by Verdict, or Confession upon their Arraignment;

ment; otherwise such as stand Mute, answer indirectly, or challenge peremptorily, might have had their Clergy (as the Act seems to imply) otherwise it had not taken Clergy away in those cases.

The Judgment of *Paine fort & dure*, that is, *Pain grievous and durable*, was not at the Common Law, but ordained by the Statute of *West.* 1. made *Anno* 3 *Ed.* 1. whereby it was enacted, That *notorious Felons, openly known of evil name, who will not put themselves upon Enquests of Felonies, which men do prosecute at the Kings suit, shall be put in hard and strong Prison, as they which refuse to be tried by the Law of the Realm; but this is not to be intended of Prisoners which be taken of light Suspicion.* By which Statute it doth appear, that none shall be judged to this pain, if there be not evident or probable matter to convince him of the offence whereof he is arraigned,

or

Stamford *lib.2. fol.149.* Poulton *De Pace, fol.211.*

or otherwise, that he is a notable Thief, or openly known to be of Evil name; which the Judge ought strictly to examine before he proceed to this Judgment against him, it would be very hard (which the Law is never *in favorem vitæ*) to extend this Statute to *Manslaughter*, which may be suddenly committed by one of good name and fame, and not a notorious Thief (as this Act mentions) and yet may have an obstinate humor to refuse Trial, challenge peremptorily, and make indirect Pleas.

It is the severest Judgment (that I know) the Law passes upon any Offender, and therefore not to be extended further than the plain understanding of the words of the Act, a Sentence so severe, that (I think) never *English* man as yet (though many have been Prest to death) had the heart to execute it according to the letter, which Sentence is as followeth, That *the Prisoner shall be sent to the Prison from whence he*

he came, and put into a Mean house, stopped from light, and there shall be laid upon the bare ground, without any Litter, Straw, or other covering, and without any Garment about him, saving something to cover his Privy members, and that he shall lie upon his back, and his head shall be covered; and his feet bare; and that one of his Arms shall be drawn with a Cord to one side of the house, and the other Arm to the other side, and that his Legs shall be used in the same manner, and that upon his Body shall be laid so much Iron and Stone as he can bear, and more, and that the first day after he shall have three morsels of Barley-bread, without any Drink, and the second day he shall drink so much as he can, three times, of the Water which is next the Prison-door, saving Running-water, without any Bread; and this shall be his Diet until he die.

4 Ed. 4. 11.
14 Ed. 4. 7.
6 H. 4. 2.

No Forfeiture but of Goods.
Fit. Esch. 19.

Another inconvenience may arise, where the party Indicted and Arraigned only of *Manslaughter* shall plead a Forrein plea of something done in another County, to the delay of Justice; the Statute of the 22 *H.* 8. *c.* 14. only providing, in cases of *Petit Treason*, *Murther*, or *Felony*, that Forrein pleas in those Cases shall be tried before the same Justices before whom such persons shall be Arraigned, and by the same Jurors of the same County that shall trie the petit Treason, Murther, or Felony. If a man be Indicted of *Treason* he may plead a Forrein plea, which shall be tried in another County, otherwise in cases of *Murther*, *Petit Treason*, and *Felony*.

Coke 3 *Inst. fol.* 27.

Another inconvenience may be upon the Statute of the 6 *H.*8. *c.*6. By that Statute, the Justices of the Kings Bench are impower'd to remit the bodies of *Felons* and *Murtherers* removed thither to be tried in the County, and their Indictments

6 H.8.c.6.

dictments removed into that Court, which before they could not do by the Common Law; becauſe a Record that is once brought into the higheſt Court, could not be remanded to an Inferior, *Stamf. fol.* 157. this Statute only provides in caſe of *Felony* and *Murther*, not *Manſlaughter*. Stamf. *fol.* 157.

The laſt Inconvenience I ſhall mention (though I could many more) by reaſon of Indictments of *Manſlaughter*, will be in Cities, and Burroughs, and Corporations, that have power to try *Murthers* and *Felonies*; the Statute of the 23 *H.* 8. *c.* 13. provides, That *in Trials of* Murthers *and* Felonies *there proceedings ſhall not ſtay as formerly, or be delaied by reaſon of challenge of ſuch Offenders, for lack of ſufficiency of Freehold, to the great hindrance of Juſtice; but that if the Jurors be worth in Monies and perſonal Eſtate Forty pounds, they ſhall not be challenged, but admitted.* 23 H. 8. c. 13.

It will be a very extorted construction that upon this Statute, and the others before shall bring in Manslaughters under the word *Felonies*, whatever practice is, or hath been used to the contrary. I conceive it fit to be better considered, for it is not sufficient (in all Cases, much less in this) without, or against a Rule and Act of Parliament, to justifie practice by practice; this happily in the end might prove a Common Thief to be an honest man.

Every Manslaughter is Felony, but not e converso.

Besides, observe the penning of other Statutes, and that will give a clearer light to the understanding of these; by the Statute made in the 27 of *H.8. c.25.* it was enacted, *That no person or persons, of what estate or degree soever, shall have power or authority to pardon or remit any* Treasons, Murthers, Manslaughters, *or* Felonies, *whatsoever they be*, &c. Here you see the Makers of this Law mention the word and offence of *Manslaughter*, *in terminis*, and not

27 H.8.c.25.

not leave it to be understood, or to be comprehended in the word other Felonies, though it is most comprehensively said, *or Felonies whatsoever they be.*

So the Statute made in the first and second *Ph. & Mar. c.* 13. *That the Justices of the Peace (one being of the* Quorum*) when any Prisoner is brought before them for any* Manslaughter *or* Felony, *before any Bailment or Mainprise, shall take the examination of the Prisoner, and Information of the Accuser, and certifie it at the next Goal-delivery, &c.* Here you see *Manslaughter* and *Felony* both expresst, as necessary, several times in the Act. 1,2 Ph. & Mar. c. 13.

So the Statute of the 23 *H.* 8. *c.* 12. that directs the manner of punishing of offences in the Kings Palace or House, says, *All Treasons, Misprisions of Treasons, Murthers, Manslaughters, and other malicious Strikings, &c.* and so divers other Acts of Parliament (as might be shewed) that make 23 H.8.c.12.

or intend any proviſion againſt Manſlaughters, do particularly name the word *Manſlaughter*, and never leave it to be intended or included in the word *Felony*. It is true, that by a Commiſſion granted to certain perſons to enquire of all Felonies, they may thereby take Indictments of Murther; though a Pardon of all Felonies will not avail him who hath committed Murther, in regard of the Statute made 13 *R.*2.1.

Kel.fol.98.

And the Commiſſion of *Oyer* and *Terminer*, made to the Judges every Aſſizes, that enables them to enquire of all Offences, hath theſe expreſs words in it, *And of whatſoever* Murthers, Felonies, Manſlaughters, Killings; not leaving Manſlaughters to be intended by the general words of *Felonies* or *Killings*.

Many more Inconveniences might be ſhewed, but theſe (with what hath been before ſhewed) may be ſufficient, until better reaſons appear to ſatisfie any under-

understanding Grand Juror, to esteem it much the better way to find such Bills Murther, rather than Manslaughter, there being every way less inconvenience in it, in relation to the Laws of the Land (until by the wisdom of a Parliament they are altered) and much more of satisfaction and safety to their own private Consciences, that stand so deeply engaged to discover Blood-guilty persons, and to suppress and silence the cries of Innocent blood, that by our Laws (in the first place) cries to Grand Jurors for Vengeance against the Murtherer and Manslayer.

It now remains that two Objections be answered, that happily to such as do not well weigh and consider them may seem to be of some force against what hath been herein said to the contrary; the one is, *The general liberty, and constant practice Grand Jurors have taken ever since the making of the said Statute of the*

23 H.8.c.1. 23 H.8.c.1. *to find, as they please, either* Murther *or* Manslaughter; *not as the Indictment comes to their hands from the Kings Council, but as they apprehend the Evidence that is brought to them, taking upon themselves not only the sole Judgment of the Fact, and what the Law is that ariseth upon the said Fact, taking the Judgment of the Law therein from the Court (although they hear but one side) and putting in and putting out what they please in such Indictments, notwithstanding it appears to them the party Indicted is guilty of shedding Innocent blood, varying the species of Murther and Manslaughter as they please, until after Arraignment of the Prisoner it be too late to amend it, as I have often known.*

The other Objection is (and this seems to be of some weight and authority in Law against what hath been said) *That Mr. Justice* Stamford, *in his book of*

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The Pleas of the Crown, *is of another opinion*, viz. *That a Grand Jury may find the Special matter in the Indictment; that is to say, that the Prisoner killed the other* se defendendo, *or* per Infortunium, &c. *which the party upon his Arraignment may either confess, or estrange himself from the fact, and plead, Not guilty.*

To the first Objection, as to the *liberty and practice of Grand Jurors to the contrary so long used*, I Answer, It hath been before in this Treatise sufficiently made out, the great Inconvenience and mischief, in Cases of Blood, that is the consequence of such practice, and that being granted (as it cannot be denied) I suppose no wise man will think, that the long practice of such an Errour will justifie it, or encourage the longer continuance of it, in the highest Courts of Law and Justice, and in so high and tender an Offence as the disquisition of Blood is, although in Inferiour County Courts,

Courts, where (many times) are ignorant Judges, and mean Clerks; and in ordinary Offences this Maxime may hold good, that *Communis Error facit Jus*, that the common practice of an Error makes it the Law of the Court, and not convenient to be altered; yet I have never observed that Maxime to take place in the highest Courts of Justice in this Kingdom, before the Judges of the Courts at *Westminster*, Justices of Oyer and Terminer, Justices of Goal-delivery, and Justices of Assize, who sit not to practice, but to correct and destroy Errors of all kinds, especially in Trials of mens Lives, in Cases of Blood, and whoever shall urge that Maxime against what I have here said, doth by that sufficiently grant, what I have here endeavoured to prove, *viz.* the errour and inconvenience of such practice, which ought no more to be continued, than a long custome, when it is found to be unreasonable; but

but I shall never allow (neither can it be proved) that there hath been in this Kingdom such liberty and practice, allowed and indulged by the Reverend and Learned Judges to Grand Jurors, to find and alter Indictments brought unto them in cases of Blood, as they themselves please and judge convenient; they being (as hath been said before) not the Judges, nor the Triers, but Presenters of a fact of Blood, fit for the Judgment of the Jury of Life and Death, who only are the proper Judges of the Fact; for none can be said to be proper Judges of any Fact in Controversie that hear but one side, for Grand Jurors hear no more, and therefore ought in Law, Reason, and Conscience (where they find a guilty person that hath had his hands in Blood, and unjustly taken away the Life of another person) to leave it (as an entire fact of Murther) to the Trial and Verdict of the second Jury to find the truth of the Fact (upon

(upon hearing of both sides, and receiving the Judgment of the Court) in what species or degree of Murther it is, which likewise if any doubt or point of Law arise in the Case (as many times it doth) they may find it specially (which a Grand Jury cannot) and thereupon receive the opinion of all the Judges of *England* (*Murther* being the Genus of the several Species) and in common acceptation, he is accounted a Murtherer that kills any man, or reasonable Creature unlawfully; and the Commandment is, *Thou shalt do no Murther*, which certainly comprehends all unlawful killing, otherwise that command is not well translated from the Text, *Non Occides*, *Thou shalt not Kill*; and in my own experience, for above forty and five years in one Circuit, I have very often known many Learned Judges, such as Mr. Justice *Doderidge*, the Lord Chief Baron *Davenport*, Mr. Justice *Jones*, Mr.

Mr. Justice *Whitlock*, and many others, often rebuke and reject the Presentments of Grand Jurors, in Cases of Blood, and other Felonies, where they have either varied from their Evidence, or from the Law, the Judges before hand having received some light of the nature and testimony of the Fact, from the Informations and Examinations therein delivered into the Court by the Justices of the Peace and Coroners (a very good Rule for Judges to observe) and often either put it upon an open Evidence in Court (which is very inconvenient) or discharged them of such a Bill, and bound the Witnesses over to the next Assizes (which is also very inconvenient) in regard Witnesses may die, or the Prisoner may die, and so the Forfeiture is lost, and the offence unpunished; and in Cases of Blood there will be too much opportunity given for compounding and making an Interest with the Prosecuter and Witnesses; and

and in these modern times, since the happy return of our most gracious Sovereign, King *CHARLES* the second, I have known several learned and pious Judges, some since dead, others yet living, and eminent upon the Bench in *Oxfordshire* Circuit, Fine and Imprison several Grand Jurors for their miscarriage and misdemeanour in delivering in Bills of *Manslaughter* instead of Bills of *Murther*, against the clear and positive directions of the Court. And this may serve for answer to the first Objection, from the liberty and affected practice of Grand Jurors (in finding of Bills in Cases of Blood) according to their own humor and apprehension to introduce a Law, that therefore they may find them as they please, notwithstanding that the Court adviseth and directeth the drawing of them *MURTHER*.

To the second Objection of Mr. Justice *Stamford* (in the place before cited) where he saith, that

whereas

whereas the Statute of Glouc. c. 9. *saith, That he ought to put himself in an Inquest* de bono & malo, *this is only intended* (saith he) *when he is Indicted of* Murther *or* Manslaughter, *and not where in the body of the Indictment, the Special matter is found* (as if the Grand Jury may find especial Verdict) *of* per Infortunium, *or* se defendendo, *&c.* I answer to this Objection, Certainly Mr. Justice *Stamford* (though a very Learned man) did well consider this matter, and his Opinion therein, when he set it down; for he informs you not what shall become of such an Indictment, where only the Special matter is found by the Grand Jury, whether the party may Traverse it (for it is but a Trespass) or confess it, and so have his Pardon of Course upon such confession, and then the Judges that are to make the Report or Certificate of the nature of the fact to the King in *Chancery*, must Certifie like blind and deaf men, that

that never saw or heard any thing of the merit of the cause, nor understand any thing by evidence of the nature and circumstance of the Fact; like the Lay-zealot, must believe as the Priest believes, preferring Obedience before Truth; but sure no prudent and pious Judge will make such a blind Certificate, in case of Blood.

Besides, whoever shall judiciously and impartially compare and weigh the Statute of *Marlebridge* and the Statute of *Glouceſter* together, and the reasons of the Statute of *Glouceſter*, what mischief it was made to prevent, and consider but the nature of the thing, will never be of his Opinion in this particular, there is so little of reason or true meaning of either of those Statutes in it. The words of the Statute of *Marlebr.* are these, *Murther from henceforth shall not be judged before our Justices, where it is found Misfortune.* In the time of this Statute, it seems, there were two Juries, the Grand Jury,

Jury, and the Jury of Life and Death, to present and try the Offences of Murther, otherwise the Justices could not judge of it, they never passing Judgment upon a Grand Juries presentment; which, by the way, shews, that it is left to the Judges (not the Grand Jury) upon the examination of the cause in trial by the Jury of Life and Death, to judge of the nature and circumstances of Murther, and of what species or degree it is. This Statute of *Marlebridge* did only declare a new Law, that where it was found *per Infortunium*, or *se defendendo*, it should not be Felony and Murther as it was before that Statute; but that the party in such case should have (upon Certificate of the Justices before whom he was tried) his Pardon of course; happily then, upon the Presentment of the Grand Jury; which might be the occasion of this erroneous Opinion of this Learned Judge.

Then comes the Statute of *Glouceſter*, as if the other had not been truly underſtood, or at leaſt had not ſufficiently provided for offences of Blood, and in plain words (as before is mentioned) commands, *That he that kills a man by misfortune, or in his own defence, or in any other manner without Felony, ſhall be put in Priſon until the coming of the Juſtices in Eyre, or Juſtices of Goal-delivery, and ſhall put himſelf upon the* Country *for good and evil*, that is, *for life and death*, which cannot poſſibly be underſtood where the Grand Jury find it but *per Infortunium*, or *ſe defendendo*, &c. for that is not Felony, and ſo cannot be Arraigned thereupon, whereby to put himſelf *de bono & malo*, ſo as to bring the matter to Iſſue between him and the King; nor can the Judge in that caſe (as is ſaid before) make a true and right Certificate of the offence and matter of fact, which muſt be ſpecially and truly certified according to Law,

Law, whereby to procure a pardon, as that Statute expresly requires. And if the party shall plead *Not guilty* to that Special matter found by the Grand Jury, what can that signifie (as before hath been shewed) for the Jury that is charged with such Indictment, must either find the party guilty in Special manner, as it was found before by the Grand Jury (and that makes too specially Verdicts;) or else generally *Not guilty*; if they find him guilty of the Special matter (as the Grand Jury found before them) and the Judge and Court shall afterwards adjudge (as they may, having heard the Evidence) that *super totam materiam*, it is either Murther or Manslaughter; then no Judgment of Death or Clergy can be given upon that Indictment or Verdict, but all must be tried over again, and a new Circuit of business upon a second Indictment of Murther or Manslaughter; and how dilatory and idle would this be at an Assizes, in

course of Justice, and in case of Blood.

If Judge *Stamford* were alive again (although a person of great Learning and Judgment) he would surely (with some other Errors in that book) recant this; neither is it of any advantage to the Prisoner, to have it found Specially by the Grand Jury, for he can never plead either such an Acquittal or Conviction in Bar to an Indictment of Murther or Manslaughter in the same case (as before is shewed;) and whoever shall read and well consider this seventh Chapter, written by Judge *Stamford*, in *The Pleas of the Crown*, wherein this Opinion is, especially towards the end of it, when he comes to observe the Letter of the Statute of *Glouceſter*, and how the Certificate of such a Pardon of course shall be obtained, must of necessity hold his first Opinion in that Chapter (for the Special matter to be found in the Indictment) to be very inconsiderately expressed for

for the reasons aforesaid. And why may not this Learned Judge (for *humanum est Errare*) mistake in this, as in some other Opinions in that Book of his styled, *The Pleas of the Crown*? for which he is detected by the Lo. *Coke*, and others that followed him, who standing upon his shoulders must needs see farther, than he did or could; As to instance in some few:

As first, that Respit of Execution (where a Woman is *privivment enfent*) where a Woman after Judgment pleads her Belly, shall be granted only (*says he*) in Felony: whereas it is grantable both in high Treason and petit Treason. Stamf. *fol. ult. 6.* Coke 3 *Inst. fol.* 18.

A second is, That the year and the day after the Murther and Homicide committed, shall be accounted after the blow given, or poyson administred: whereas it ought to be accounted after the death, for then the party was murthered, and not after the stroke Stamf. *Pl. Cor.* 63. 26 Ass. p. 52. Coke 3 *Inst. fol.* 53.

or

or poyſon given; *Coke* lib.4.fol.41, 42. in *Heydon's* Caſe.

A third obſerved by the Lord *Coke* (writing upon the Statute 8 *H.6. c.*12. which makes it Felony to ſteal away Records) upon theſe words in the ſaid Statute, *Their Procurers, Counſellors and Abettors*, ſaith this Act, *expreſly extendeth to Acceſſaries before, and leaveth Acceſſaries after to the conſtruction of Law*; yet there may be Acceſſaries after the Fact, for whenſoever an offence is made a Felony by Act of Parliament, there ſhall be Acceſſaries to it, both before and after, as if it had been a Felony by the Common Law: And therefore, though this Act expreſſeth only Acceſſaries before, yet it taketh not away Acceſſaries after, but leaveth them to the Law, contrary to the Opinion of Mr. Juſtice *Stamford*.

v.3 & 4 Ph. & Mar. *Juſtice* Dalifon's *Rep.*

Stamf. *Pl. Cor.* 160.

And again, by the Statute of the 8 *H. 6. c.* 29. Inſufficiency or want of Freehold, is no cauſe of Challenge to Aliens who are Impanelled

8 H.6. c.29.

pannelled with Aliens, notwithstanding Mr. Justice *Stamford*'s Opinion, *Pl. Coron.* 160. for this Statute saith, That *the Statute* 2 H. 5. c. 3. *shall extend only to Enquests betwixt Denizen and Denizen.*

Stamf. *Pl. Cor.* 160.

2 H. 5. c. 3.

But enough (and perhaps too much) hath been said in mentioning the mistakes of that Reverend and Learned Judge Sr. *William Stamford*, in that Book of his termed *Placita Coronæ*, Pleas of the Crown, which it seems by the Title of it hath been corrected, amended, and enlarged, since the first Impression of it; which I have not urged in the least to detract from the Learning and Honour of that great and learned Judge, or from the value of that Book, which notwithstanding there may be a few mistakes found in it, yet is of as high esteem as any Book of the Law, extant upon that Subject; but principally to shew, that he may as well erre in his Opinion concerning Grand Jurors

Sr. W. Stamford, *Kt. one of the Justices of the Common Pleas.*

rors finding the Special matter, as in those mentioned; and that no human Author, in the Law, or any other Science, is infallible; and that we must be very careful how we ground any Law upon the bare Opinion of any one, or two persons (though of never so great parts or esteem) whereby to justifie or maintain a great Inconvenience in practice, especially in Cases of Blood, as before hath been shewn.

FINIS.

b 9.

[illegible] 1.6